Supreme Court, U.S.
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No._____

IN THE UNITED STATES SUPREME COURT

October Term, 1994

GEORGE S. ROBERTSON,
Petitioner

v.

BELL HELICOPTER TEXTRON INC.,
Respondent

PETITION FOR WRIT OF CERTIORARI

ON APPEAL FROM THE U.S. 5TH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Whether an employee's internal investigation of overcharging by his employer to the United States government invokes whistleblower protection of 31 U.S.C. § 3730(h).

2. Whether U.S. 5th Circuit Court of Appeals committed plain error in denying Robertson his state cause of action for wrongful discharge.

PARTIES

GEORGE S. ROBERTSON,
Petitioner-Appellant,

v.

BELL HELICOPTER TEXTRON INC.,
Respondent-Appellee.

ON APPEAL FROM THE U.S. 5TH CIRCUIT
COURT OF APPEALS

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STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254. A final appealable decision was rendered by the United States 5th Court of Appeals on September 26, 1994. The Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291. This court should grant certiorari and exercise jurisdiction because two decisions by the U.S. Court of Appeals are in conflict concerning protected activity of individuals investigating overcharging to the government. In addition, this Court should grant certiorari on the basis that the U.S. 5th Circuit Court of Appeals committed plain error in its interpretation of Texas state law and depriving Robertson of a right to trial by jury of his claims under Texas law.

STATUTES INVOLVED IN THE CASE

18 U.S.C. § 286

Conspiracy to defraud the Government with respect to claims, Whoever enters into any agreement, combination, or conspiracy to defraud the United States, or any department or agency thereof, by obtaining or aiding to obtain the payment or allowance of any false, fictitious or fraudulent claim, shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

28 U.S.C. § 1254

Courts of appeals; certiorari; certified questions. Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

31 U.S.C. § 3730(h)

Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employ-

ment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.

STATEMENT OF CASE

Bell Helicopter, Appellee, employed George S. Robertson, Appellant, from 1986 to February 1992. During his employment, Robertson received commendations from the U.S. Army and from his supervisors for his devotion to his position as a senior contract administrator in Department M-1, Army Helicopter Improvement Program (AHIP), which was a part of the Contracts Department. Record at vol. 6, p. 55 l. 4 to p. 57 l. 13. In fact, Robertson was a dedicated employee who worked many overtime hours when compared with his counterparts. *Id.* at p. 60, l. 22 to p. 61, l. 8. Robertson reported to Alvin Leavell, his immediate supervisor. *Id.* at p. 17, l. 18. William Wilson was in charge of Department M-1, with Robert Holten as second in charge. *Id.* at ll. 21-24. Wilson and Holten reported to M.D. McCrary, Vice President of Contracts who was responsible for contract administration on all helicopter programs with the government, including the U. S. Army and the U. S. Navy. *Id.* at p. 18, l. 2.

Under the AHIP program, Bell refitted older helicopters with up to date guidance and weapon systems for the United States Army. The Army brought Bell old helicopter airframes, which the Army had stripped of equip-

ment, and Bell refitted these helicopter with new equipment. Record at vol. 6, p. 14, l. 9 to l. 14. The Army ordered the refitting of the helicopters in groups called "contract lots" which were consecutively numbered. *Id.* at ll. 19-19. The Army contracted with Bell to build the helicopters for a fixed price per lot. However, the Army was required to deliver an airframe free of defects. If the airframe contained a defect, Bell could charge above the negotiated contract price to repair the defect in the airframe to unanticipated maintenance line items. *Id.* at p. 29, l. 22. However, if Bell made a mistake in refitting the helicopters, this mistake was charged to Bell's overhead instead of charged directly to the Army on the contract. *Id.* at p. 27, l. 20 to p. 28, l. 6. Bell used a form called the Material Defect Form (MDF) to charge Bell's mistakes to its overhead. *Id.* at p. 22. ll. 7-14. The MDF carried a charge number which would charge the mistake to Bell's general overhead account. The general overhead account was used by Bell to establish an overhead rate that was spread out among all of Bell's work on an annual basis.

George Robertson investigated (1) whether Bell was improperly charging the Army for unanticipated maintenance and repair for $850,000 on Contract Lot 4, $750,000 for Lot 5, $1,000,000 for Lot 6, and $1,000,0000 for Lot 7 (Record at vol. 6, pp. 21 and 22 and Plaintiff's Exhibit 9 and 10); (2) whether Bell was improperly charging $2,000,000 for engineering and logistic hours by charging hours which were supposed to be worked in the production of the aircraft and charging production hours to the weapons development contract (Record at vol. 6, pp. 76-78); (3) whether Bell was habitually overcharging the government for maintaining the helicopters during the first 10 days after the aircraft were delivered to the Army. (Record at vol. 6, pp. 88-89); and (4) whether Bell was improperly charging the government $4,950,000 a second time for 45 machine gun sets costing $110,000 per set by requisitioning these guns under the propulsion and hydraulic budget line item when they had already been purchased. (Record at vol. 8, pp. 11-14).

Bell knew that Robertson was investigating whether amounts requested for unanticipated maintenance and repair were proper because Robertson questioned his supervisors regarding the propriety of Bell's charging practices, attempted to obtain information from his supervisors, and attempted to obtain information from other sources as well. In the spring of 1990, Robertson received a call from Debbie Barnett, the manager of accounts receivable who requested Robertson to obtain approximately 1.8 million dollars for additional funds for unanticipated maintenance and repair for Lots 4 and 5. Record at vol. 6, p. 20, l. 14, p. 21, l. 5-13. Robertson immediately informed his supervisor Leavell of the problem, and they began to look into it. Record at vol. 6, p. 21, l. 5-13. Both Leavell and Robertson spoke with Holten, their supervisor, and informed him of the problem. They informed Holten that additional funds could not be requested until proper substantiation was forthcoming. They continued to inform Holten in meetings held every 5 to 6 weeks. Record at vol. 6, p. 23, l.16-25.

Holten, Leavell, and Robertson had a meeting with Guy Turner, the manager of program controls, regarding the appropriateness of the overrun of unanticipated maintenance and repair. Turner was going to try to determine the validity of the costs. Record at vol. 6, p. 24, l. 12-22. Robertson went with Turner to obtain computer generated information from Frances Adams, a supervisor in Labor Accounting. Robertson even showed her a sample report. Record at vol. 6, p. 66, l. 13-25. This information would have provided detailed information for the items charged against the unanticipated maintenance and repair budget line item and would have been very helpful in determining whether charges were valid. Adams did not provide any information although Robertson explained to her that he was aware that this information could be obtained in Bell's electronic computer files. Record at vol. 6, p. 25 l.23-p.26 l. 14. Turner admitted to Robertson that he uncovered $625,000 that should not have been charged under the line item of unanticipated maintenance and repair.

Record at vol. 6, p. 26, l. 16-20.

For over 1.5 years Robertson continually called Don Marlow, the manager of flight operations and asked him how he was charging time to maintain helicopter at the airport. Robertson believed that these charges were being improperly charged to unanticipated maintenance and repair. Record at vol. 6, p. 26, l. 23-25. In September of 1991, Marlow told Robertson that in fact work was being charged to unanticipated maintenance and repair. Record, vol. 6, p. 27, l. 7-16.

Robertson discovered that the Material Defect Form had been discontinued. This form was used to charge Bell's mistakes in making a helicopter part to Bell's general overhead. The contracts for AHIP did not allow Bell to charge the defective part directly to the government. Record vol. 6, pp. 27-29. Robertson discovered that Bell had improperly charged the government under unanticipated maintenance and repair for its mistake in manufacturing a column and painting a door. Record vol. 6, pp. 63-65.

Turner informed Robertson that the job was too big for him. Wilson, the manager of AHIP, put Holten in charge of verification of the costs of unanticipated maintenance and repair. Record at vol. 6, p. 31, l. 9-14. In every meeting, the issue of requesting additional funds for unanticipated maintenance and repair arose and both Robertson and Leavell would ask Holten if the charges were substantiated. Holten would inform them they had not been substantiated, and Leavell and Robertson would indicate that requests for additional money could not be made until proper substantiation was forth coming. Record at vol. 6, p. 31-32.

In the November of 1990, Leavell ordered Robertson to write letters requesting additional funds for unanticipated maintenance and repair for Lots 4 and 5. Holten had not substantiated the charges. Leavell had been ordered to do this by Wilson. Wilson told Leavell that additional funding for Lots 6 and 7 would not need to be requested until proper substantiation of the charges

were forthcoming. Robertson wrote the letters for Lots 4 and 5 but told Leavell that he would have to sign them. Record at vol. 6, pp. 33-35. Robertson could have signed these request for more money if he had chosen to do so. Record at vol. 10, p. 101, l. 3-14. However, both Robertson and Leavell called the contracting officer, Ms. Betty Wucher, and told her not to process this request for additional funds until they told her the charges had been substantiated. The request for additional funds was not paid until January of 1992. Record at vol. 6, p. 39.

Robertson told Leavell, Holten and Grow, all of whom were his supervisors that he would not write letters for unanticipated maintenance and repair for Lots 6 and 7 until proper substantiation was forthcoming. Record at vol. 6, p. 42, l. 6. Robertson believed that he would be subjected to criminal penalties for requesting funds that had not been properly substantiated. Record at vol. 6, pp. 41, l. 22- p. 42, l. 1.

By the end of 1990, at monthly meetings of Bell management, the issue of requesting additional funds for unanticipated maintenance and repair for Contract Lots 6 and 7 came up and Leavell and Robertson indicated that these additional funds could not be requested until proper documentation was provided. Holten, Wilson, Leavell, Robertson, and Barnett were present at these meetings. Record at vol. 6, p. 42-43. Leavell told Wilson directly that the letters for Contracts Lots 6 and 7 would not be written until the investigation was complete. Record at vol. 6, p. 45, l. 6-9 vol. 10, p. 104, l. 22 - p. 105, l. 18. Holten never provided any verification of the proposed additional funds for unanticipated maintenance and repair. Record at vol. 6, p. 45, l.11-13. In every meeting, Robertson told Holten that the letters for Lots 6 and 7 could not be written because the investigation had not been completed. Record at vol. 6, p. 46, l. 7-14.

Leavell was replaced with John Grow in October of 1991. At the time Leavell was transferred, he believed that he was being transferred because he had questioned Bell's billing practices. Record at vol. 10, p. 101, l. 15-21.

Record at vol. 6, p. 17, l. 7-11. However, Leavell contradicted this testimony before the jury. Record at vol. 10, p. 114, l. 6-7. Leavell had also told Robertson that he could be fired if he reported any problem to Bell's ethics hot line. Record at vol. 8, p. 45, l. 17-22. Grow requested Robertson to write a letter asking for additional funds for unanticipated maintenance and repair for Contracts Lots 6 and 7 in December of 1991. Robertson refused and told Grow that proper substantiation had not been prepared to support the request for additional funds for unanticipated maintenance and repair for Contract Lots 6 and 7. The next day Grow drafted a letter requesting additional funding for Lots 6 and 7. Record at vol. 6, p. 46, l. 19-25 p. 47 l. 8-23. Plaintiff's Exhibit 10.

On February 12, 1992, Robertson was informed that he was being terminated. The district court improperly concluded that none of the foregoing activities constituted protected conduct. Record at vol. 6, p. 62, l. 5-19 and Record Excerpts at p. 40.

Bell also knew that Robertson was investigating Bell for improperly charging $2,000,000 for engineering and logistic hours by charging hours which were supposed to be worked for the production of the aircraft and charging production hours to the weapons development contract. Robertson reviewed the problem with Leavell, Holten, and Turner. Record at vol. 6, p. 77-79.

Bell knew that Robertson was investigating whether Bell was habitually overcharging the government for maintaining the helicopter during the first 10 days after the aircraft was delivered to the Army. Alvin Leavell admitted in his direct testimony that he and George Robertson discussed this issue and they had a vehement disagreement over it in January of 1992. Record at vol. 10, p. 96, l. 10-18. Robertson interviewed Don Marlow, the head of the airport, and learned that all time was being charged to the government. Bell could only charge the government for time used in maintaining the aircraft if the aircraft had been left at Bell for 10 days after the aircraft was delivered. Record at vol. 6, p. 87-89.

Bell knew that Robertson was investigating whether Bell was improperly charging the government $4,950,000 a second time for 45 machine gun costing $110,000 per set by requisitioning these guns under the propulsion and hydraulic budget line item when they had already been purchased. (Record at vol. 8, pp. 11-14). Robertson obtained the cost ledgers and identified the problem that machine gun sets were being ordered twice for the same airship resulting in a huge increase in costs to the government. Robertson wrote a purchase order directing that this practice cease. Paul Linscott, a supervisor in purchasing controls, who was responsible for this overcharge, contacted Wilson, Robertson's supervisor and indicated that he did not want to comply with Robertson's directive. Record at vol. 8, p. 11, l. 16 - p. 15, l. 15.

In conducting these investigations, Robertson went beyond to scope of his job in looking for information and signaled to Bell his sincere intent to determine whether these charges were substantiated. Robertson's job consisted of negotiating contract proposals, issuing purchase orders which authorized expenditures of material and labor to those individual managers building the helicopters based on the negotiated proposal and keyed to the purchase order, and preparing costs reports. It was not Robertson's primary job to insure that every part and every hour of labor was accurately recorded against the proper charge number. Such job was primarily the job of timekeeping, quality assurance, and security personnel. Record at vol. 6, p..68, l.3-4, p. 69, l. 15-21, p. 70, l. 18-20. Even Alvin Leavell, Robertson's immediate supervisor testified that Robertson's job consisted of running the line and managing development programs which would improve the aircraft and did not include investigating allegations of potential overcharges to the government. Running the line meant that Robertson was to make sure that the production line was running, that aircraft were delivered on time, and that Bell got paid on time. Record at vol. 10, p. 109, l. 4-15, p. 110, l. 4-7.

As a result of the above actions, George Robertson

filed this action on July 14, 1992 as this case presented a federal question under the False Claim Act, 31 U.S.C. § 3730(h), for which jurisdiction was proper pursuant to 28 U.S.C. § 1331 and 1367, with regard to the petitioner's pendant state claim.

In his complaint, Robertson alleged 1) that he had been discharged on February 14, 1992, in violation of 31 U.S.C. § 3730(h) for investigating overcharges by Bell Helicopter Textron Inc. (Bell) to the United States Army and for refusing to sign letters requesting additional funds from the Army which Bell refused to substantiate; 2) that, in the alternative, Bell violated the public policy of the State of Texas, a *Sabine Pilot Service, Inc. v. Hauck*, 687 S.W. 2d 733 (Tex. 1985) cause of action, for firing Robertson for not performing an illegal act or an act which possibly was illegal; 3) that, in the alternative, a breach of employment contract occurred in that he had relied to his detriment on Bell's representations that persons were required to report potential overcharging to his supervisors; and 4) that, in the alternative, he was discriminated against because of his age. Bell denied these allegations.

On April 13, 1993, the court granted partial motion for summary judgment against Robertson dismissing Robertson's detrimental reliance claim based on employment contract. The court denied the motion for summary judgment on Robertson's claims of retaliation for investigating overcharging to the government. However most significantly, the Court ruled that Robertson's intracorporate reporting to Bell was not activity protected by 31 U.S.C. § 3730(h). The Court also denied summary judgment on Robertson's *Sabine Pilot* allegations.

The case was tried before a jury from April 19 through 22, 1993. At the close of Robertson's case-in-chief, Bell moved for directed verdict which was denied by the court. At the close of Bell's case, Bell moved again for a directed verdict which the court denied. On April 23, 1993, the eight member jury rendered a unanimous verdict in favor of Robertson on his claims of retaliation in violation of 31 U.S.C. § 3730(h). The charge of the court

instructed the jury that they could not answer any of the questions regarding the *Sabine Pilot* allegations if they answered the questions with regard to *Qui Tam* retaliation in the affirmative. The Court reasoned that if the jury found in favor of Robertson on the *Qui Tam* retaliation claim that the jury could not answer the questions regarding *Sabine Pilot* because the termination based on *Sabine Pilot* could not be the sole cause of the termination. Robertson objected to the jury charge and objected to the manner in which the Court structured the charge. Bell did not object to the charge. On April 23, 1993, the jury sent a message to the Court requesting guidance as to whether the jury could award more money to Robertson if they could not answer the *Sabine Pilot* questions. The Court instructed them that they could not. On July 29, 1993, the Court granted Bell's motion for judgment and rendered judgment in favor of Bell.

Robertson filed an appeal to the district court's decision stating that the trial court committed reversible error when it stated that no evidence supported the jury's verdict finding that Bell Helicopter had retaliated against Robertson. More specifically, Robertson argued that the district court had used the wrong standard in defining protected activity, and even with the restrictive definition utilized by the district court, Robertson had clearly presented enough evidence that Bell was on notice of Robertson's protected activity. Petitioner also appealed the district court's ruling that there was no evidence to create an inference that Bell's reason for termination was pretextual. Finally, Robertson appealed the district court's decision that the jury was prevented from addressing his state wrongful discharge claim.

SUMMARY OF ARGUMENT

The 5th Circuit Court of Appeals committed reversible error when it affirmed the district court's judgment as a matter of law and found that there was no evidence to support the jury's finding that Bell Helicopter did not know of Robertson's protected activity. The 5th Circuit

committed reversible error when it stated that . . . "Robertson's reporting was qualitatively different than the reporting that occurred in the cases he cites. As a result, we conclude that Robertson's reporting did not constitute protected activity under the False Claims Act."

The Court erred in refusing to allow the jury to answer questions regarding Robertson's refusal to engage in activity that he perceived was illegal on the ground that his claims of qui tam retaliation were mutually exclusive. Once the district court entered judgment against Robertson on his qui tam retaliation case, the Court abused its discretion by not allowing Robertson to have a new trial on the *Sabine Pilot* cause of action.

Robertson brings this application for certiorari because of the important impact that this case could have on the United States of America. For more than thirty years, this country has been plagued by deficit spending. Clearly, part of that has been the result of overcharging to the United States government. The United States Congress enhanced the protection afforded to those individuals who are willing to risk their jobs to expose graft and corruption to protect the American taxpayer. The District Court for the Northern District of Texas and the Fifth Circuit Court of Appeals have a restrictive interpretation on the *qui tam* whistleblower protection which may cause a chilling effect to investigation by private citizens of their employer's illegal practices.

ARGUMENT

1. Whether an employee's internal investigation of overcharging by his employer to the United States government invokes whistleblower protection of 31 U.S.C. § 3730(h).

A. The 5th Circuit's ruling that the jury's verdict should be set aside as a matter of law is in error as a matter of law.

In *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 503 (1956) this Court reviewed factual sufficiency

questions when "lower federal and state courts persistently deprive litigants of the right to a jury determination. The Court should address this case because Robertson has been deprived of the proper jury determination.

After reviewing all of the evidence and deliberating for one and a half days, the jury found on April 23, 1992, the following factual conclusions:

(1) That Robertson engaged in activity protected by 31 U.S.C. § 3730(h) in that he investigated fraudulent charging practices by Bell in furtherance of a false claims action.

(2) That Bell knew Robertson was engaged in protected activity.

(3) That Bell selected Robertson for lay off because he engaged in protected activity.

(4) That Bell had failed to establish a reasonable non-discriminatory explanation for discharging Robertson.

(5) That Bell's explanation of Robertson's termination was a cover-up to disguise what was in truth an intent to retaliate against Robertson for his investigation of alleged fraud.

On July 29, 1993, the district court found pursuant to Bell's motion that the jury verdict was not supported by any evidence that Bell had the requisite knowledge of Robertson's activities. The district court further found that there was no evidence to support the jury's determination that the reason proffered by Bell for discharging Robertson was a pretextual reason to hide discrimination. The 5th Circuit affirmed the trial court's ruling stating that Robertson's investigations were not protected activity as defined by the False Claims Act thus depriving Robertson of the jury's verdict.

B. Standard of Review

The 5th Circuit as a matter of law ruled that Robertson's activities do not fall within the parameters of protection afforded by the False Claims Act. The court's ruling was pursuant to a review of a judgment as a matter

of law after a favorable finding for Robertson, petitioner. Furthermore, the court held contrary to the 7th Circuit's ruling that internal reporting of wrongdoing was protected activity. Consequently, this Court's review is de novo as the sufficiency of the evidence is a matter of law regarding Robertson's activities.

C. The 5th Circuit failed to articulate a proper standard to reach its decision.

The 5th Circuit uses district court cases and states that internal reporting is protected activity, but fails to adopt a standard. *Robertson v. Bell Helicopter Textron*. 32 F.3d 951 (5th Cir. 1994). "With regard to Robertson's reporting of his concerns to his superiors, several district courts have held that Sec. 3730(h) protects internal whistleblowers. *Id.* citing, *Clemes v. Del Norte County Unified Sch. Dist.*, 843 F.Supp. 583, 595-96 (N.D.Cal.1994); *United States ex rel. Kent v. Aiello*, 836 F.Supp. 720, 723-24 (E.D.Cal.1993); *Neal v. Honeywell, Inc.*, 826 F.Supp. 266, 269-73 (N.D.Ill.1993).

The 7th Circuit adopted a standard which clearly protects internal reporting in *Neal v. Honeywell*, 33 F.3d 860, (7th Cir. 1994) which entertained a similar case. In construing the language of the 3730(h), the court held that internal reporting was protected activity. The 5th Circuit distinguishes *Neal* from the Robertson case by splitting hairs, saying that Robertson's actions were not "reporting" while Neal's actions were protected. The legislative history indicates otherwise.

> The False Claims Act's provision for whistle blowing states:
> Any employee who is discharged, demoted, suspended, threatened, harassed, or in a any other manner discriminated against in terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initia-

> tion of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all necessary relief to make the employee whole. False Claims Act, 31 U.S.C. § 3730(h) (1986).

An employee who becomes aware of potential overcharging of a government contractor has a right to investigate on his own to see if such suspicions are true. An individual has a right to engage in "lawful acts done by the employee on behalf of the employee . . . including investigation for . . .in an action filed or *to be filed* under this section . . . ." (emphasis added) 31 U.S.C. § 3730(h). Retaliation by the employer towards the employee for conducting the lawful acts on behalf of himself for an action to be filed is proscribed by the statute.

With regard to statutory interpretation, this Court said, "in determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy. *Crandon v. U.S.*, 494 U.S. 152, 158 (1990).

The legislative history clearly articulates the purpose and intent of the FCA. The United States Senate version was passed in 1986. The Senate's report states that "the proposed legislation seeks not only to provide the Government's law enforcers with more effective tools, but to encourage any individual knowing of fraud to bring that information forward." S. REP. No. 99-345, 99th Cong., 2nd Sess., *reprinted in* 1986 U.S. CODE CONG. & ADMIN. NEWS at 5266-67. Furthermore, the report indicated that the act was intended to increase the incentive for private individuals to act on behalf of the Government. The report continues to emphasize how fraud has become a problem of national importance. In detecting fraud, the cooperation of individuals is extremely important, "yet in the area of Government fraud, there appears to be a great unwillingness to expose illegalities." Senate Report at 5269.

The Senate's Subcommittee on Administrative Practice and Procedure in its hearings discovered a "conspiracy of silence" in regards to detection of fraud in deal-

ings with contractor employees. Senate Report at 5270. The Subcommittee heard several cases of employees who did not contact outside governmental agencies and were afraid to report internally overcharging matters for fear of retaliation by their employers. Senate Report at 5270. Particularly, one individual who told his supervisors that he would no longer mischarge on his time cards was retaliated against by his employer. Senate Report at 5270. In response to this attempt to enforce the conspiracy of silence by employers, the Congress enacted changes to allow people who are unwilling participants in fraud to be afforded protection. Senate Report at 5271.

Finally, the Committee clearly stated that the "whistle blower" section was designed to "halt companies and individuals from using the threat of economic retaliation to silence 'whistle blowers,' as well as those who *may be considering* exposing fraud." Senate Report at 5299. In addition, the Committee also stated that protected activity should be interpreted in a broad manner. Senate Report at 5299.

The 7th Circuit's opinion reflects this understanding when it states that "a better understanding is that "to be filed" limits coverage to situations in which litigation could be filed legitimately—that is, consistently with Fed.R.Civ.P. 11. *Neal* at 864. When an employee in good faith investigates an employer's possible overcharging to the government these actions are protected.

While referring to the district court cases, the 5th Circuit attempts to distinguish Robertson's activities from those before the court in *Neal* without considering the legislative intent of the statute. The court said, "by contrast, in this case, Robertson admitted that he never used the terms "illegal," "unlawful," or "qui tam action" in characterizing his concerns about Bell's charges. (FN2) Thus, Robertson's reporting was qualitatively different than the reporting that occurred in the cases he cites. As a result, we conclude that Robertson's reporting did not constitute protected activity under the False Claims Act." 32 F.3d 952.

This argument set forth by Bell and adopted by the 5th Circuit ignores the legislative intent of the False Claims Act whistleblower section. The reason the whistleblower protection was strengthened was in response to witnesses who were fired for refusing to commit an illegal act. Robertson also refused to commit an illegal act when he refused to authorize payment for two separate lots of helicopters. Robertson raised his concerns regarding improper charging on a monthly basis to his supervisors. In fact, Robertson refused to write a letter asking for addition contract money for Contacts Lot VI and VII. Robertson even called the Army's contracting officer, Ms. Betty Wucher, and told her not to process the requests for additional funds for Contracts Lot IV and V. He alerted his supervisor to the fact that the requests for additional money for particular lots of Helicopters that were being submitted were without substantiation and therefore possibly fraudulent. Although Robertson never used the magic words *quit tam*, illegal and may not have used the term unlawful, Robertson indicated that something was wrong with what Bell was doing. This type of inquiry is exactly the kind of conduct the legislature sought to protect; therefore breaking the "code of silence" committed by employees who were afraid of raising their concerns with management because of possible retaliation.

D. The 5th Circuit ignored the record when it held that Robertson's activities did not put Bell on notice that it could be subject to false charging litigation.

After incorrectly ruling that Robertson's activities alone were not protected, the Appeals Court turned to the highly restrictive instruction requiring Bell to have actual knowledge of Robertson's investigation. Although Robertson throughout his testimony and even Bell's own employees knew that Robertson was conducting an investigation into overcharging, the 5th Circuit chose to ignore the record and ruled that Robertson's activity did not put

Bell on notice which would provide an incentive for Bell to retaliate.

(1) The record clearly indicates that Bell had notice of Robertson's investigation.

The 5th Circuit focused on Robertson's testimony as to whether his activities put Bell on notice. This completely ignores the record with regard to Bell's own witnesses who knew that Robertson repeatedly attempted to obtain information which could severely affect Bell's work with the government. Bell's own witnesses testified against Bell and provided contradictory and conflicting testimony. Alvin Leavell, Robertson's direct supervisor testified that he knew overcharging was illegal. Record at vol. 10, p.103, l. 17. In fact, Leavell thought of filing a lawsuit because of his transfer. Record at vol. 10,. p.101, l. 20 to p.102, l. 16. Leavell testified that Robertson's primary job was to run the line and improving aircraft, not investigating false charges. Record at vol. 10, p.109, l.4-11. Leavell unequivocally stated that investigating the potential of overcharging was not Robertson's job. Record at vol. 10, p.109, l. 12-15. Robertson also came to him in January 1992 and expressed deep concern about perceived overcharging. Record at vol. 10, p.96 l. 3-18. In fact, they had a "vehement disagreement" over Robertson's concerns. *Id.* This testimony clearly shows that Bell had knowledge through its managers that Robertson was investigating potential false charges to the government by Robertson's actions and words.

Leavell's testimony alone establishes that Bell knew Robertson was investigating Bell's billing practices. Leavell testified that he believed he was transferred out of the department because of him questioning the billing practices by Bell. Record at vol. 10, p.101, l. 15-l. 19. Finally, Leavell testified that after he was transferred out of the department, he warned Robertson to watch his back because the new supervisor saw things differently than Leavell did. Record at vol. 10, p. 111, l. 25, to p. 112, l.4. Further examination of Bell's witnesses' testimony sup-

ports George Robertson's case that Bell, through its managing agents, knew that Robertson was investigating potential overcharging U.S. Government contracts. Robert Holton, one of Robertson's supervisors testified that he knew Robertson had concerns regarding overcharging the government. Record at vol. 10, p.132, l. 22 to p.133, l. 2 and vol. 10, p. 135, l. 10-18. Robertson wrote one letter to the government asking for additional funds but told the contracting officer to disregard the request as it had not been properly substantiated. Thereafter, Robertson refused to writing letters to the government requesting additional funds and representing to the government that all charges were proper. Record at vol. 10, p. 132, l. 16-20. Holton also testified that his supervisor, William T. Wilson, had been advised of Robertson's concerns regarding unanticipated maintenance and repair. Record at vol. 10, p.140, l. 14-25. Robertson testified over and over regarding his concerns with potential overcharging the government and his refusal to request funding from the government for unanticipated maintenance and repair. In fact, Holton stated that Wilson was completely apprised of unanticipated line items on contracts. Record at vol. 10, p. 141, l. 7-8. On the other hand Wilson's testified before the jury that he did not have any conversations with Holton concerning the letter writing or "anything of that nature" which included Robertson or Leavell. Record at vol. 10, p. 80, l.8-20. Wilson's testimony was substantially impeached by the testimony of Leavell and Holton. The jury was well within its discretion to disbelieve almost all of their testimony. The jury properly evaluated the evidence in favor of Robertson, found that he had engaged in protected activity in that he performed a qui tam investigation, and that management knew of Robertson's activities.

(2) The record clearly demonstrates that Bell's knowledge can be inferred from Robertson's activities.

In *Texas Aluminum Co. v. National Labor Relations Board*, 435 F.2d 917,919 (5th Cir. 1970), the 5th Circuit reviewed a retaliation case for exercising rights

protected under the National Labor Relations Act. In *Texas Aluminum Co.*, the court held that knowledge by the employer of the employee's union activity was essential to a finding of violation of the pertinent sections of the Act. See *N.L.R.B. v. Mid State Sportswear*, Inc., 412 F.2d 537, 539 (5th Cir. 1969). However, the court further held that knowledge may be inferred from circumstantial evidence and that it was unnecessary that the record reflect a direct connection between the employee's admitted union activity, which the Board found precipitated the discharge, and the knowledge of the employer. The court found that it was evident from the record that the employer through a supervisor was well aware of the employee's union activities. In that capacity, the supervisor's knowledge was imputable to the employer. See *N.L.R.B. v. Transport Clearings, Inc.*, 311 F.2d 519, 523 (5th Cir. 1962).Moreover, the trier-of-fact properly may infer a discriminatory animus and the requisite knowledge from the circumstances surrounding an employee's termination. *International Union of Operating Engineers Local 406 v. National Labor Relations Board*, 701 F.2d 504, 508 (5th Cir. 1983). Robertson was terminated within 60 days of his refusal at the request of his supervisor to write letters requesting additional funds for Lots VI and VII.

The 5th Circuit has further recognized that a plaintiff will rarely be able to produce direct evidence of an employer's motive for a discharge. The plaintiff can, therefore, produce circumstantial evidence from which the court can infer a finding of improper motive. *Abilene Sheet Metal, Inc. v. N.L.R.B.*, 619 F.2d 332, 338-39 (5th Cir.1980). These cases are equally applicable to retaliation in violation of 31 U.S.C. § 3730(h).

George Robertson's testimony demonstrates that he was engaged in protected activity, and that his employer was well aware that he was concerned with overcharging to the United States government. Both on direct and cross examination, Robertson testified how he went beyond the scope of his job to investigate his concerns that Bell was overcharging the government. He informed his

superiors as to his concerns. Record at vol. 6, p.72, l. 3-l. 23. While attempting to work through channels of management, Robertson exhausted every available avenue to determine if overcharging was in fact occurring. Record at vol. 8, p.68, l. 18-l. 22. Bell simply did not respond to his inquiries. Notwithstanding, Robertson continued to press his superiors to get answers to his questions. Record at vol. 8, p. 99, l. 18 to p.100, l. 25. Robertson testified over and over that he refused to request millions of dollars in additional funds for Contracts, Lot IV and V, VI and VII. Robertson's testimony was not impeached. Not only did Robertson press his superiors for information, he conducted independent inquiries to obtain information to which he did not have access. Record at vol. 8, p,105, 1,18 to p.110, l. 16. In addition, Robertson as well as his supervisor, Alvin Leavell, testified that it was beyond his job description to go to specific people and ask them specifically what they were doing. *Id.* Furthermore, Robertson testified that his job consisted of giving information to his superiors as to what had been effectively negotiated with the government, but his job did not require him to follow up on that information or see how Bell billed on the contract during its execution. Record at vol. 6, p. 70, l. 7.

In his testimony, Robertson stated that he went to Don Marlow, Record at vol. 8, p. 106, l. 20), talked to Frances Adams, Record at vol. 8, p.108, and had discussion with Guy Turner Record at Record at vol. 8, p. 108, l. 16. All of these individuals are managers with Bell.

The 5th Circuit ruled that Robertson would have to go beyond his job description to demonstrate that Bell was on notice of an investigation. That position is contrary to the record. Robertson testified that he went beyond his job requirements and sought out information regarding potential overcharging. Furthermore, Leavell testified that Robertson's job was to monitor the line and work on development of programs. This completely refutes Bell's contention that Robertson was only "doing his job." Finally and most importantly, Leavell,

Robertson's direct supervisor, testified that Robertson went beyond the course and scope of his duties. This completely corroborates Robertson's testimony. Even if Robertson was simply doing his job, his conduct was protected activity under the False Claims Act, and Bell was aware of Robertson's activities and the significance of his investigation.

To say that Robertson failed to address his supervisors testimony that Robertson was just doing his job is to make a credibility finding. Robertson testified he did go beyond his job while Bell stated the contrary. The jury was entitled to believe one over the other. The jury chose not to believe Bell. Bell's management testified that they knew that overcharging the government was illegal. Clearly, the jury could infer that if Robertson's concerns were true then Bell's managers could face not only civil penalties but criminal penalties as well. Moreover, contradictions in Bell's witnesses are abundant. For example, Holton testified that he kept Wilson advised of all of Robertson's concerns. On the other hand, Wilson testified that he had no recollection of Robertson's concerns with overcharging. Bell's own witnesses impeached themselves before the jury. Bell's management knew that Robertson was engaged in an investigation of Bell's practices of charging on U.S. government contract. The jury was well within its prerogative to find that Bell knew that Robertson was engaged in such investigation and that Bell was well aware of Robertson's intentions.

Clearly, the lower courts erred in its ruling that Robertson's activities were not protected since the FCA protects him. Furthermore, the lower courts were wrong when it ruled that jury could not have found that Robertson was entitled to protection. This Court should reverse the 5th Circuit and remand for further proceedings.

(3) The 5th Circuit committed plain error when in its interpretation of Texas state law upheld the trial court's denial of Robertson's wrongful discharge claim.

In *Sabine Pilot*, the Texas Supreme Court recognized an exception to the employment at will doctrine for employees who are terminated for reporting illegal conduct. In *McClendon v. Ingersoll-Rand Co.*, 779 S.W. 2d 69 (Texas 1989), reversed on ERISA's preemption, 498 U.S. 133 (1990), the Texas Supreme Court found a violation of public policy in a case involving an employee's termination to prevent the attainment of pension benefits. Although this case was reversed by this Court on the issue of ERISA preemption, the Texas Supreme Court indicated a willingness to extend the public policy exception to civil matters and beyond the criminal conduct proscribed in *Sabine Pilot*.

In this case, the trial court submitted the FCA case to the jury first. If the jury had answered that no violation of the FCA had occurred, then the jury could reach the question concerning the *Sabine Pilot* cause of action. The Court reasoned that under *Sabine Pilot* the termination for refusal to engage in an illegal act must be the sole cause of the termination and that if the jury answered that Robertson was terminated for engaging in protected activity in violation of the FCA that he could not have been terminated solely for refusal to perform an act potentially illegal. Robertson objected to the structure of the jury charge and requested that the court submit the *Sabine Pilot* cause of action to the jury first. When the jury had answered all of the questions regarding the FCA in the affirmative, the jury wanted to proceed to answer the rest of the questions concerning *Sabine Pilot* as the jury sent a request to the court requesting that if it could not answer the *Sabine Pilot* then could it award Robertson more money under the FCA claim. The Court instructed that it could not.

The 5th circuit upheld the district court's ruling citing *Pease v. Pakhoed Corp.*, 980 F.2d 995, 997 n. 1 (5th Cir.1993), stating that "an employee who alleges wrongful discharge for refusing to perform a criminal act cannot advance additional claims." The 5th Circuit affirmed the trial court stating that Robertson's pleading in the alter-

native prevented him from bringing his cause of action to the jury. 32 F.3d 953. This ruling is plain error allowing Bell Helicopter to escape culpability for their wrongdoing as the 5th Circuit's extremely narrow interpretation of Texas law is contrary to the public policy of the state of Texas.

Normally, this Court defers to construction of state law given by the lower courts. *Brockett v. Spokane Arcades, Inc.* 472 U.S. 491 (1983), citing, *Chardon v. Fumaro Soto*, 462 U.S. 650, 654-655 n.5 (1983). However ,the Supreme Court will review a lower federal courts ruling to the meaning of state law if plain error exists. *Palmer v. Hoffman* 318 U.S. 109, 118 (1943). To permit Bell Helicopter to get away with their egregious behavior would be a miscarriage of justice and travesty to the American taxpayer in this time of trillion dollar deficits; therefore, this court should exercise its right of state law review as the 5th Circuit erred for the following reasons.

The 5th Circuit's reliance on *Pease* are incorrect to the extent that these cases hold that the employee's termination must be solely the result of *Sabine Pilot* protected activity. In *McClendon* at p. 71, the Texas Supreme court expressly recognized that an employer may bring a *Sabine Pilot* cause of action even though he had an ERISA cause of action under federal law for similar proscribed conduct. This Court ultimately reversed the Texas Supreme Court and found that ERISA's expansive preemption preempted the *Sabine Pilot* cause of action. 498 U.S. 133 (1990). Notwithstanding this reversal, the Texas Supreme Court expressly recognized the viability of both a *Sabine Pilot* cause of action together with another similar cause of action. Robertson's case is very similar. He has a federal *qui tam* cause of action for being terminated for investigating false charges to the government and a *Sabine Pilot* cause of action for being terminated for refusing to write letters which he believed were not properly substantiated and which would subject him to criminal penalties for requesting sums from the government with misrepresentation to the government. Robertson's *Sabine*

Pilot claim should have been submitted to the jury to give effect to the public policy that in order to keep their jobs, employees should not be required to perform illegal acts.

Furthermore, in *Winters v. Houston Chronicle Pub. Co.*, 795 S.W. 2d 723 (Tex. 1990), the Texas Supreme Court declined to create an exception to the employment at will doctrine on a public policy basis on the facts of the case. However, in a concurring opinion, Justice Doggett, joined by Justices Ray and Mauzy, went to great lengths to explain what could constitute violations of public policy in the future and defined the elements of a prima facie cause of action for employees who suffer employer retaliation for exposing from within activities that have probable adverse affect on the public. See also *Johnston v. De Mar Distributors,* 776 S.W. 2d 768, (Tex. App. Corpus Christi 1989), a *Sabine Pilot* cause of action may be brought for employees terminated because they questioned the legality of their employer's actions.

There is no question that submitting false claims to the government of the United States is a crime. See 18 U.S.C. § 286 (1986). George Robertson was required by his superior, Wilson acting through Leavell, to transmit letters to the Army requesting approximately $1.6 million in cost overages for unanticipated maintenance and repair for Lots IV and V in November and December of 1990 and directly requested to sign letters requesting additional funds for contract Lots VI and VII. Robertson was required by his superiors to do this although he and his supervisor Leavell had been requesting proper documentation for months with none provided. Moreover, Leavell told Wilson that letters for Lots VI and VII would not be written until proper substantiation had been provided. At the time of Leavell's transfer in October 1991, no documentation had been provided. Shortly after writing the letters for Lots IV and V, Robertson contacted the contracting officer in charge of approving the $1.6 million request and informed her to disregard it.

In fact, Robertson had questioned his superiors and investigated a great number of substantial problems

with Bell's charging the Federal government. Robertson's superiors did not respond to his questions and investigations. In one meeting, Robertson's questions and concerns were so perplexing that Robertson was never asked to attend meetings discussing the same overcharges.

Robertson had clear concerns regarding Bell's charging practices and could never obtain satisfactory responses or documentation from his superiors. His supervisors required him to personally write letters upon the threat of losing his job. Robertson did his best to keep his job and apprise the government of amounts that he did not believe were correct. Because Robertson did not fall in line or blindly accept orders from his superiors, he was quietly laid off when the opportunity arose. Such conduct violates the public policy of the State of Texas as enunciated by the Texas Supreme Court.

Moreover, Robertson's claims are not mutually exclusive. Robertson could have been terminated for engaging in activity protected by the FCA and because he refused to perform an act which potentially was illegal. Both of the reasons could have been considered to be the sole cause of his termination if the jury believed that Bell terminated Robertson independently for each conduct. In other words, FCA protected conduct or *Sabine Pilot* protected conduct could be independent causes of Robertson's termination and each be considered the sole cause of Robertson's termination. Surely, Bell should not escape liability for conduct prohibited by the United States Congress in the FCA and the public policy of the State of Texas simply because it is guilty of violating them both. The Texas Supreme Court recognized an exception to the employment at will doctrine for employees who are terminated for reporting illegal conduct.

The trial court submitted the FCA case to the jury first. If the jury had answered that no violation of the FCA had occurred, then the jury could reach the question concerning the *Sabine Pilot* cause of action relying on *Pease* which was plain error. The jury should have been allowed to answer both questions as both were indepen-

dent causes of action. Nevertheless, the court found as a matter of law that Bell did not retaliate for investigating a *qui tam*. As such, the trial court should have conducted a new trial and allowed a jury to consider his state cause of action.

Clearly, plain error has been committed by the lower courts. *McClendon, Winters,* and their progeny indicate that the 5th Circuit has misinterpreted Texas state law since the cases sighted allowed two causes of action to exist when an employer retaliates against an employee for refusal to commit an illegal act. Therefore, this Court should reverse the 5th Circuit and allow Robertson to go forth with his cause of action based upon wrongful discharge.

CONCLUSION

For the foregoing reasons, Robertson respectfully requests that this Court grant certiorari, reverse the 5th Circuit's ruling that Robertson actions were not protected activity as defined by False Claims Act, and remand the False Claims Act to the 5th Circuit for disposition of the pretext issue. Petitioner further requests that this Court remand Petitioner's state cause of action for trial.

Respectfully submitted,

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APPENDIX

Fed. Rptr., 7-33 F.3d
32 F.3d 948, Robertson v. Bell Helicopter Textron, Inc., (C.A.5 (Tex.) 1994)
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——— Page 32 F.3d 948 follows ———

9 IER Cases 1669

George S. ROBERTSON, Plaintiff-Appellant,

v.

BELL HELICOPTER TEXTRON, INC., Defendant-Appellee.

No. 93-1789.
United States Court of Appeals,
Fifth Circuit.
Sept. 26, 1994.

Former employee who worked as contract administrator for government contractor brought suit against contractor under whistleblower provision of False Claims Act and under Texas common law for wrongful discharge. The United States District Court for the Northern District of Texas, Eldon B. Mahon, J., granted judgment as matter of law on False Claims Act claim and determined that employee was not entitled to jury determination on wrongful discharge claim. Appeal was taken. The Court of Appeals, W. Eugene Davis, Circuit Judge, held that: (1) reporting of concerns to superiors was not protected activity under False Claims Act; (2) employee failed to show that contractor knew of qui tam investigation; and (3) employee's assertion that he was fired in retaliation for investigating qui tam action precluded Texas common-law claim alleging discharge for refusing to perform illegal act.

Affirmed.

1. FEDERAL COURTS k765
   170B ——
   170BVIII Courts of Appeals
   170BVIII(K) Scope, Standards, and Extent
   170BVIII(K)1 In General
   170Bk763 Extent of Review Dependent on Nature of Decision Appealed from
   170Bk765 Judgment notwithstanding verdict.
   C.A.5 (Tex.) 1994.

Court of Appeals uses the same standard of review that guided district court when reviewing the grant of a judgment as matter of law.

2. FEDERAL COURTS k801
   170B ——
   170BVIII Courts of Appeals
   170BVIII(K) Scope, Standards, and Extent
   170BVIII(K)3 Presumptions
   170Bk801 Judgment n. o. v.
   C.A.5 (Tex.) 1994.

Evidence together with all reasonable inferences are considered in light most favorable to party opposed to motion for judgment as matter of law.

3. FEDERAL CIVIL PROCEDURE k2603
   170A ——
   170AXVII Judgment
   170AXVII(E) Notwithstanding Verdict
   170Ak2603 Grounds in general.
   C.A.5 (Tex.) 1994.

Motion for judgment as matter of law should be denied if there is substantial evidence such that reasonable and fair-minded jurors might reach different conclusion. Fed.Rules Civ.Proc.Rule 50(b), 28 U.S.C.A.

4. MASTER AND SERVANT k30(6.35)
   255 ——
   255I The Relation

255I(C) Termination, Discharge, and Discipline
255I(C)2 Discharge or Discipline
255k30 Grounds and Liabilities
255k30(6.35) Exercise of Constitutional or political rights; criticism and "whistle blowing.".
C.A.5 (Tex.) 1994.

Whistleblower provision of False Claims Act prohibits harassment, retaliation, or threatening of employees who assist in or bring qui tam actions. 31 U.S.C.A. Sec. 3730(h).

5. UNITED STATES k120.1
393 ——
393VIII Claims Against United States
393k120 Making or Presentation of False Claims and Other Offenses Relating to Claims
393k120.1 In general.
C.A.5 (Tex.) 1994.

Internal reporting of concerns about charges to government by contractor employee was not "protected activity" under False Claims Act; employee never used terms illegal, unlawful, or qui tam action in characterizing concerns about charges. 31 U.S.C.A. Sec. 3730(h).

See publication Words and Phrases for other judicial constructions and definitions.

6. UNITED STATES k120.1
393 ——
393VIII Claims Against United States
393k120 Making or Presentation of False Claims and Other Offenses Relating to Claims
393k120.1 In general.
C.A.5 (Tex.) 1994.

Purpose of False Claims Act is to discourage fraud against government, and whistleblower provision is intended to encourage those with knowledge of fraud to

come forward. 31 U.S.C.A. Sec. 3730(h).

7. UNITED STATES k122
   393 ——
   393VIII Claims Against United States
   393k120 Making or Presentation of False Claims and Other Offenses Relating to Claims
   393k122 Penalties and actions therefor.
   C.A.5 (Tex.) 1994.

Evidence that government contractor was aware that contract administrator's investigations were in furtherance of qui tam action was required to establish that contractor possessed retaliatory intent when discharging administrator, in violation of whistleblower provision of False Claims Act. 31 U.S.C.A. Sec. 3730(h).

8. MASTER AND SERVANT k30(6.30)
   255 ——
   255I The Relation
   255I(C) Termination, Discharge, and Discipline
   255I(C)2 Discharge or Discipline
   255k30 Grounds and Liabilities
   255k30(6.30) Refusal to perform wrongful act.
   C.A.5 (Tex.) 1994.

Exception to Texas employment at-will doctrine protects employee who is discharged for sole reason that employee refused to perform illegal act; refusal to perform illegal act must be sole reason advanced for discharge.

9. MASTER AND SERVANT k35
   255 ——
   255I The Relation
   255I(C) Termination, Discharge, and Discipline
   255I(C)2 Discharge or Discipline
   255k34 Actions for Wrongful Discharge
   255k35 Nature and form.
   C.A.5 (Tex.) 1994.

Contention by former employee of government contractor that he was fired in retaliation for investigating qui tam action precluded claim under Texas common law based on employee's refusal to perform illegal act; employee's refusal to perform illegal act was not sole reason advanced for discharge.

Anthony G. Parham, Irving, TX, for appellant.

Paul D. Inman, Karl G. Nelson, Gibson, Dunn & Crutcher, Dallas, TX, for appellee.

Appeal from the United States District Court for the Northern District of Texas.

Before POLITZ, Chief Judge, and DAVIS and WIENER, Circuit Judges.

W. EUGENE DAVIS, Circuit Judge:

Plaintiff, a former employee of Bell Helicopter Textron, Inc. ("Bell"), sued Bell under 31 U.S.C. Sec. 3730(h) alleging that he had been discharged in retaliation for investigating possible overcharging of the United States Government. He also asserted a state law claim for wrongful discharge for refusing to perform an illegal act. The jury returned a verdict for plaintiff on the federal claim, but the district court granted Bell's motion for judgment as a matter of law. We affirm.

I.

George Robertson was employed by Bell as a senior contract administrator in Department M-1 of its Army Helicopter Improvement Program ("AHIP"). In that position, Robertson was responsible for ensuring that AHIP costs were properly charged and that requests for additional funding were substantiated. Under the AHIP program, Bell refitted older helicopters with up-to-date guidance and weapons systems for the U.S. Army. The Army ordered the refitting of the helicopters in groups called "contract lots," which were consecutively numbered.

Robertson reported to Alvin Leavell, who was his

immediate supervisor. William Wilson was in charge of Department M-1, and Robert Holton was second in charge. Wilson and Holton reported to Daniel McCrary, who was responsible for contract administration on all helicopter programs with the United States Government.

In November 1990, Leavell asked Robertson to request an additional $1.6 million for Contract Lots IV and V for unanticipated maintenance and repair. No explanation was given as to why the additional funds were due. Nevertheless, Robertson wrote a letter to the government requesting the additional $1.6 million. Robertson, however, told the government contracting officer not to process the request because it had not been verified. Leavell then informed Wilson that neither he nor Robertson would request additional funds for unanticipated maintenance and repair until the increased costs were substantiated.

During this time, Robertson voiced his concerns to several of his superiors about the

——————— Page 32 F.3d 950 follows ———————

lack of verification for these additional charges. Robertson also sought to substantiate the charges by requesting information from managers of different departments. Robertson testified at trial that he raised the cost-charging issue with his supervisors on an almost monthly basis. Robertson's immediate supervisor, Leavell, testified that he was aware that Robertson was concerned about the additional charges.

In 1991, Wilson asked Leavell to write a letter requesting an additional $2 million for unanticipated maintenance and repair for Contract Lots VI and VII. Leavell declined to make the request without proper justification. In October 1991, Leavell was transferred to another department, and Robertson was placed under the supervision of John Growe. In December 1991, Growe asked Robertson to write the letters requesting the additional $2 million for Lots VI and VII, and Robertson

refused.

In November 1991, Leavell recommended that Robertson receive a 3+ rating on his performance evaluation for 1991. Wilson, however, assigned Robertson a 3 rating. Wilson testified that he lowered the rating because Robertson was occasionally tardy and had difficulty communicating effectively.

In February 1992, as part of a general reduction in Bell's workforce, Robertson was laid off. Bell maintains that Robertson was chosen because he had the lowest performance rating. On the day after being notified of his layoff, Robertson complained to the Director of Bell's Ethics Office that he was being laid off because of his age. He also suggested that Bell might be engaged in improper charging, but stated that he did not have any evidence of fraud.

On July 14, 1992, Robertson filed suit against Bell, asserting claims for (1) age discrimination, (2) retaliation for reporting false claims in furtherance of a qui tam action under 31 U.S.C. Sec. 3730(h), (3) wrongful discharge for refusing to perform an illegal act, and (4) estoppel. Robertson eventually dropped his age discrimination claim, and the district court granted Bell's motion for summary judgment on the estoppel claim. The case proceeded to trial on the federal retaliation and state wrongful discharge claims. After Robertson rested, Bell moved for judgment as a matter of law, which the district court denied. Bell renewed its motion after the close of all the evidence, but it was again denied.

The jury was properly instructed that in order to find for Robertson on his federal retaliation claim, they had to find that Bell knew Robertson was investigating alleged fraud in an effort to bring, or to help the government to bring, a False Claims Act suit. The jury found that Bell knew of Robertson's investigation in furtherance of a qui tam action. (FN1) The jury also found that Bell had not given a reasonable, non-retaliatory explanation

for discharging Robertson. Under the instructions given by the district court, because the jury found for Robertson on his retaliation claim, it did not answer the interrogatories regarding his state law wrongful discharge claim.

After the jury returned its verdict, the district court granted Bell's motion for judgment as a matter of law. The court determined that there was insufficient evidence to support the jury's findings that Bell knew of Robertson's alleged investigations in furtherance of a qui tam action or that Bell discharged Robertson because of such investigations. The court also found that there was insufficient evidence to support the jury's finding that Bell's non-retaliatory explanation was pretextual. Finally, the district court concluded that, as a matter of law, Robertson was not entitled to a jury determination on his wrongful discharge claim.

II.

A.

[1][2][3] In reviewing the district court's decision to grant a judgment as a matter of law, we use the same standard of review that guided the district court. Crosthwait Equip. Co. v. John Deere Co., 992 F.2d 525, 528 (5th Cir.), cert. denied, — U.S. ——, 114 S.Ct. 549, 126 L.Ed.2d 451 (1993). We consider all the evidence with all reasonable inferences in the light most favorable to the party opposed to the motion. Id. If the facts and the

—— Page 32 F.3d 951 follows ——

inferences point so strongly and overwhelmingly in favor of Bell that reasonable jurors could not arrive at a contrary verdict, then the motion was properly granted. Id. If there is substantial evidence—that is, evidence of such quality and weight that reasonable and fair-minded jurors might reach a different conclusion—then the motion should have been denied. Id.

[4] The "whistleblower" provision of the False Claims Act prevents the harassment, retaliation, or

threatening of employees who assist in or bring qui tam actions. In particular, the statute provides:

> Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole....

31 U.S.C. Sec. 3730(h). The legislative history makes clear that a "whistleblower must show the employer had knowledge the employee engaged in 'protected activity.' " S.Rep. No. 345, 99th Cong., 2d Sess. 35 (1986), reprinted in, 1986 U.S.C.C.A.N. 5266, 5300.

This case turns on whether the record supports an inference that (1) Robertson engaged in protected activity, and (2) that Bell knew about it. Robertson argues that his actions constituted protected activity in two respects. First, he argues that internal reporting of false claims is protected under the False Claims Act so that expression of his concerns to his superiors constituted protected activity. Second, Robertson argues that his investigation of the increased costs constitutes protected activity.

[5] With regard to Robertson's reporting of his concerns to his superiors, several district courts have held that Sec. 3730(h) protects internal whistleblowers. See, e.g., Clemes v. Del Norte County Unified Sch. Dist., 843 F.Supp. 583, 595-96 (N.D.Cal.1994); United States ex rel. Kent v. Aiello, 836 F.Supp. 720, 723-24 (E.D.Cal.1993); Neal v. Honeywell, Inc., 826 F.Supp. 266, 269-73 (N.D.Ill.1993). In each of those cases, however, the employee told the employer that she was concerned about the company defrauding the government. For instance, in Neal, the court explained that the actual filing of a qui tam suit should not be a prerequisite to protection under

Sec. 3730(h):

It would make little sense to protect an anonymous qui tam plaintiff who filed an expensive and time-consuming lawsuit while ignoring someone like the Plaintiff, whose bold conduct led to a quick, voluntary and efficient disclosure of the fraud and reparation to the government. Thus, we hold that the whistleblower protection provision of the False Claims Act forbids discrimination against an employee who has made an intracorporate complaint about fraud against the government.

826 F.Supp. at 273.

[6] The purpose of the False Claims Act, of course, is to discourage fraud against the government, and the whistleblower provision is intended to encourage those with knowledge of fraud to come forward. See id. at 269. In the cases cited above, the employees did not file qui tam actions, but they did express concerns about possible fraud to their employers. By contrast, in this case, Robertson admitted that he never used the terms "illegal," "unlawful," or "qui tam action" in characterizing his concerns about Bell's charges. (FN2) Thus, Robertson's reporting was qualitatively different than the reporting that occurred in the cases he cites. As a result, we conclude that Robertson's reporting did not constitute protected activity under the False Claims Act.

[7] Robertson's second argument is that his investigation into the possible overcharging

——————— Page 32 F.3d 952 follows ———————

constituted protected activity. Bell maintains, however, that Robertson's investigations were part of his job, and that it did not know of any qui tam investigation because Robertson kept the possibility of filing a suit to himself. In response, Robertson argues that although verifying charges was part of his job, investigating them was not.

After reviewing the record, we agree with the district court that Robertson "did nothing to rebut his super-

visors' testimony regarding their lack of knowledge that he was conducting investigations outside the scope of his job responsibilities in furtherance of a qui tam action." All of Robertson's supervisors testified that they had no knowledge of any activity by Robertson in furtherance of a qui tam investigation. Moreover, Robertson conceded that he kept his qui tam intentions to himself. (FN3) Robertson never characterized his concerns as involving illegal, unlawful, or false-claims investigations. Thus, the record contains no evidence that Robertson expressed any concerns to his superiors other than those typically raised as part of a contract administrator's job. Consequently, the only way Bell could have known that Robertson's activities were in furtherance of an action under the False Claims Act would have been from his conduct. However, based on his own testimony at trial, it is clear that Robertson's actions were consistent with the performance of his duty, as a contract administrator, to substantiate requests for additional funding.

At the time Robertson began to request information in 1990, he believed that his actions were in the normal course of his duties. Only sometime in 1991 does he contend he began to consider the possibility of filing a qui tam suit. However, Robertson's conduct was the same as before he formed his qui tam intent—asking others to obtain certain information for him:

Q. Did you think that those follow-up efforts to obtain the information were within the scope of your job responsibilities?

A. Initially, but then—it was apparent to me that nobody was going to provide the information.

Q. And when did that become apparent to you?

A. In early '91.

Q. And then what did you—did you take any steps to actually obtain the information?

A. Other than to continue to ask them, because I had

no access to that information....

Thus, Robertson has identified no change in his conduct that might have objectively demonstrated his qui tam intentions.

We therefore conclude that Robertson failed to present sufficient evidence to support a finding that Bell was aware that his investigations were in furtherance of a qui tam action. Without such knowledge, Bell could not possess the retaliatory intent necessary to establish a violation of the whistleblower provision of the False Claims Act. The district court therefore properly granted Bell's motion for judgment as a matter of law on Robertson's retaliation claim.

B.

As an alternative theory of recovery, Robertson asserted a common law claim for wrongful discharge. The jury, however, never addressed this claim because under the district court's instructions, if the jury awarded Robertson recovery on his retaliation claim, it was precluded from reaching his wrongful discharge claim. After granting judgment as a matter of law on the retaliation claim, the district court determined that Robertson was not entitled to a jury determination of his wrongful discharge claim; the court concluded that Robertson's position with respect to his retaliation claim was inconsistent with his wrongful discharge claim. As a result, the district court dismissed the wrongful discharge claim.

[8][9] In Sabine Pilot Service, Inc. v. Hauck, 687 S.W.2d 733 (Tex.1985), the Texas Supreme Court recognized an exception to the employment-at-will doctrine, which protects an employee who is discharged for the sole reason that the employee refused to perform an illegal act. In Pease v. Pakhoed

——— Page 32 F.3d 953. follows ———

Corp., 980 F.2d 995, 997 n. 1 (5th Cir.1993), we made clear that "an employee who alleges wrongful discharge for

refusing to perform a criminal act cannot advance additional claims." Thus, to warrant recovery under this narrow common law cause of action, the refusal to perform an illegal act must be the sole reason advanced for the plaintiff's discharge. Robertson's assertion that he was fired for another reason—in retaliation for investigating a qui tam action—precludes his common law claim. The district court therefore properly dismissed Robertson's wrongful discharge claim.

III.

For the above reasons, we affirm the judgment of the district court.

AFFIRMED.

FN1. Robertson did not file a qui tam action until March 9, 1993. The United States elected not to intervene, and Robertson filed a notice of voluntary dismissal.

FN2. On cross-examination, Robertson testified as follows:

Q. Did you ever use the word "illegal" with anyone prior to the time that you were terminated?

A. Not the term "illegal," no.

Q. What about unlawful?

A. I don't—I may not have even used that term.

Q. What about the term "qui tam action," did you mention that to anybody?

A. No, I didn't.

FN3. Robertson testified as follows:

Q. So by June of 1991 you were taking steps in furtherance of an investigation of a qui tam action?

A. Yes.

Q. Did you bring that to anybody's attention, or was that simply your own private thought?

A. Well, it was my own private thought....

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

GEORGE S. ROBERTSON	§	
VS.	§	4:92-CV-535-E
BELL HELICOPTER TEXTRON, INC.	§	

MEMORANDUM OPINION AND ORDER

Following a jury verdict in Plaintiff George S. Robertson's favor, Defendant Bell Helicopter Textron, Inc. ("Bell") has renewed its earlier motion for judgement as a matter of law, which it urged after the closing of plaintiff's case and again after both parties had rested. Because there is no evidence in the record to support the jury's findings on two issues essential to Robertson's claim, the Court grants the motion and enters a take nothing judgement in Bell's favor.

BACKGROUND

Robertson was employed by Bell as a contract administrator for approximately six years. During the last period of his employment, he served as a senior contract administrator in the Army Helicopter Improvement Program ("AHIP"). In that position, he was responsible for, among other things, ensuring that AHIP costs were charged properly and requests for additional funding were substantiated. Beginning in at least early 1990, Robertson became concerned about the allocation to specific AHIP accounts of certain costs, which he wished to verify prior to requesting further funding from the government. He raised those concerns in several regularly held meetings with his supervisors, who indicated they would take responsibility for investigating the costs Robertson had pinpointed.

In February 1992, as part of a general reduction in its workforce, Bell determined it must eliminate two contract administrator positions in Robertson's section. Robertson, who was one of the two lowest rated persons in the section, was laid off. On the day after he received notice of the layoff, Robertson complained to a Bell equal employment opportunity officer that he was being laid off because of his age. He also mentioned that Bell might be engaging in improper cost-charging to the government but, when questioned in greater detail, said he did not know or have evidence of any fraud. Prior to his discharge, Robertson had never reported suspected wrongdoing on Bell's part to anyone within the company or its parent corporation, Textron.

Robertson subsequently commenced this action, asserting claims for: (1) age discrimination; (2) retaliation for reporting false claims in furtherance of a qui tam action under 31 U.S.C. § 3730[1] (the "retaliation" claim); (3) wrongful discharge for refusing to perform an illegal act (the "wrongful discharge" claim); and (4) estoppel. Bell moved for summary judgment on all but the age discrimination claim.

With respect to the retaliation claim, Bell argued that in order to be protected from retaliation under 31 U.S.C. § 3730(h), an employee must have reported any alleged false claims to the government. The undisputed facts showed that Robertson had never reported any suspected fraudulent charges to the government; rather, he had discussed certain concerns about the substantiation and verification of Bell's charges with his immediate supervisors. The Court granted Bell's motion on the retal-

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[1] A qui tam action under section 3730 is one brought by a private party on behalf of himself and the United States, charging that the defendant has presented false or fraudulent claims for payment or approval by the government. As discussed below, an employer may not retaliate against an employee because he has taken actions in furtherance of a qui tam lawsuit.

iation claim to the extent it was based on reporting of false claims. However, resolving all doubts in favor of Robertson as the nonmovant, the Court found there was some evidence that Robertson may have investigated suspected overcharging in furtherance of a qui tam action, which conduct would be protected under section 3730 (h). Though minimal, this evidence was sufficient to prevent summary judgment on the retaliation claim.[2]

Robertson proceeded to trial on only the retaliation and wrongful discharge claims.[3] After Robertson rested, Bell moved for judgment as a matter of law, which the Court denied. Bell renewed the motion after the close of evidence. Although the Court indicated it believed the motion had merit, it again denied the motion subject to later renewal.

The jury was instructed that in order to find for Robertson on the retaliation claim, they had to find that Bell knew Robertson was investigating alleged fraud by Bell in order to file or help the government to file a false claim action. One of the special verdict questions asked whether Bell had this knowledge. Robertson did not

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[2] Bell did not address the issue of investigation in its motion for summary judgement, apparently because Robertson's complaint and response to the motion were focused solely on his alleged reporting of false claims, not on any investigations he had conducted. In retrospect, the Court was overly generous in permitting Robertson to pursue the retaliation claim on the latter, previously unasserted, ground.

[3] The Court granted summary judgment on the estoppel claim and Robertson simply dropped his age discrimination claim, possibly in response to the Court's advice that it was inconsistent with his wrongful discharge claim. Although the Court, too leniently, permitted Robertson to present evidence on both the retaliation and wrongful discharge claims, it instructed the jury it could find for Robertson on only one of the claims.

object to the instruction or verdict question on this issue. The jury found that Bell knew of Robertson's investigations in furtherance of a qui tam action. The jury also found that Bell had not given a reasonable non-retaliatory explanation for discharging Robertson.

ANALYSIS

Bell seeks a judgment as a matter of law. The Fifth Circuit's standard for granting judgment notwithstanding the verdict (j.n.o.v.), now comprised in "judgment as a matter of law" under Fed. R. Civ. P. 50, is longstanding:

> "If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting [judgment n.o.v.] is proper. On the other hand, if ...reasonable and fairminded men in the exercise of impartial judgment might reach different conclusions, [j.n.o.v.] should be denied, and the case submitted to the jury...A mere scintilla is insufficient to present a question for the jury...However, it is the function of the jury as the traditional finder of facts, and not the Court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses...[T]he Court should consider all of the evidence—not just that evidence which supports the non-mover's case—but in the light and with all reasonable inference most favorable to the party opposed to the motion [for judgment n.o.v.]."

Molnar v. Ebasco Constructors, Inc., 986 F.2d 115, 117-18 (5th Cir. 1993) (quoting Boeing Co. v. Shipman, 411 F.2d 365, 374 (5th Cir. 1969)).

A. Bell had no knowledge of Robertson's qui tam investigations

Bell contends there is no evidence in the record that it knew Robertson was investigating allegedly fraudulent charging practices in furtherance of a qui tam

action, an issue that was essential to Robertson's recovery on the retaliation claim. The Court agrees.

The qui tam statute pursuant to which Robertson asserts his retaliation claim, 31 U.S.C. § 3730(h), provides relief to:

> any employee who is discharged...by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section.

(Emphasis added). Clearly, an employer can only be held responsible for discharging an employee because of the employee's actions in furtherance of a qui tam lawsuit if the employer knows the employee took actions in furtherance of such a lawsuit.

As Bell points out, there is not even a scintilla of evidence in the record that Bell knew Robertson was pursuing investigations in furtherance of a qui tam action.

1. Robertson did nothing to inform Bell

Robertson's testimony established that he did nothing to inform Bell of his investigations. He testified:

> Q. So by June of 1991 you were taking steps in furtherance of an investigation of a qui tam action?
>
> A. Yes.
>
> Q. Did you bring that to anybody's attention, or was that simply your own private thought?
>
> A. Well, it was my own private thought. Why would I speak up at the company and tell them I was filing — I was sitting there trying to get information to file a qui tam action that I knew I would be filing?

Tr., Vol. II at 66.

Bell's code of ethics required employees to report any wrongdoing, including fraudulent cost-charging, to their supervisors. The policy also permitted such wrongdoing to be reported to an ethics group, an anonymous hot line or persons within Textron, Bell's parent corporation. Yet, Robertson never reported any suspected mischarging through these channel prior to his notice of discharge. He did not do so, at least in part, because he believed he would be terminated if he did. Tr., Vol. II at 101. Thus, if anything, Robertson intentionally kept secret any suspicion he had that Bell's charges to the government might be fraudulent.

2. Nothing about Robertson's actions put Bell on notice

Robertson testified that as a regular part of his responsibilities, he was required to verify any costs charged to the government and to be assured of their validity before submitting funding requests. E.g., Tr., Vol II at 59. It was also his job to determine whether performance could be completed within contract funding. Tr., Vol. II at 100. To carry out these responsibilities, he had to ask for data from other people. Id. He was to report the results of any investigation to his supervisors. Tr. Vol. II at 106.

Although Robertson stated that his qui tam investigations differed from those he was required to carry out as part of his job, he could not define the difference other than to say his job didn't require him to go quite as far as he did to confirm the proposed charges. E.g., Tr., Vol. II at 106-06. According to Robertson, he became concerned about and began investigating Bell's charges to the government in the beginning of 1990. Tr., Vol. II at 26. Robertson thought his initial investigations were within the scope of his job responsibilities. Only a year or so later, that is, sometime in the first half of 1991, did he being to consider the possibility of a qui tam suit. Id.; Tr., Vol. II at 109. After that time, the only steps he took were to continue what he had already been doing, that is, ask-

ing other people to obtain information for him. Tr., Vol. II at 109.

In fact, Robertson's alleged qui tam activity was limited to talking with three individuals in different departments regarding where they were charging certain items. Tr., Vol. II at 106-09. He was not sure, however, whether his discussions with one of those people were part of his job responsibilities or not. Tr., Vol. II at 107. Further, his testimony showed that the large majority of his conversation with the other two took place before he even conceived of bringing a qui tam action. Tr., Vol. II at 107-09 (Requested information from Ms. Adams in the spring to summer of 1990, maybe once again in early 1991; spoke to Mr. Turner a couple of times through 1990 and probably once again in early 1991). Thus, all the evidence showed that Robertson's alleged qui tam investigations were identical to those conducted as a part of his job, with the exception of Robertson's personal thoughts about them.

Nor did Robertson express any concerns to his supervisors in a manner that would have alerted them he was doing anything other than his expected job of verifying charges prior to submitting them to the government. What he said was that he needed more information before he would feel comfortable submitting funding requests. There was no implication that Robertson was investigating suspected wrongdoing. Indeed, Robertson testified that before his termination, he never used the terms "illegal," "unlawful" or "qui tam action" in characterizing his concerns about verifying Bell's charges. Tr., Vol. II at 47.

Moreover, Robertson kept no record of his alleged false claims investigations that might have alerted Bell to the nature of his activities:

> Q. Did you keep a file of issues or documents that you thought went — were in support of this qui tam action which you were contemplating?
>
> A. No, I didn't.

Q. And why not?

A. I just didn't keep a file.

Q. Did you write any memos, anything to yourself, a diary, any contemporaneous record that would express your feeling that you were investigating something in furtherance of qui tam action?

A. No. I remember everything — I remember very well, and I took everything — I had everything in my head of what I needed to remember.

Tr., Vol. II at 110-11.

In other words, there was simply no objective basis for anyone other than Robertson to know that his investigations to verify certain charges, which even he believed to have been part of his job responsibilities originally, had been transformed into actions taken in furtherance of a qui tam action.

3. Robertson's supervisors uniformly were unaware he was doing anything other than his job

In keeping with Robertson's silence on the matter, every single on of his supervisors testified they were unaware of any qui tam investigations Robertson or, indeed, of any concerns or investigations that went beyond his duties as a contract administrator. Mr. Leavell, Robertson's immediate supervisor during the majority of his time at Bell, testified:

Q. Did Mr. Robertson ever indicate to you that he was undertaking any investigations beyond the scope of his job responsibilities?

A. He did not.

Tr., Vol. III at 110. Mr. Wilson, a higher level supervisor whose action in assigning Robertson a "3" instead of the "3+" rating recommended by Mr. Leavell is argued by Robertson to be evidence of retaliation, testified:

> Q. When you assigned the rating of a 3 to Mr. Robertson in 1991, had it come to your attention that Mr. Robertson was raising concerns about potential unlawful or improper activities on behalf of Bell Helicopter?
>
> A. No, sir.
>
> Q. Nothing at all?
>
> A. In the course of his work he would have been raising concerns or questions about any cost that may not have been as he had thought they would be charged, but that's art of the job of a contract administrator...[T]hat's a normal contract administration function that we do on a daily basis. There was no — nothing unusual.

Tr., Vol. III at 59-60. Robertson did nothing to rebut his supervisors' testimony regarding their lack of knowledge that he was conducting investigations outside the scope of his job responsibilities in furtherance of a qui tam action. In fact, Robertson never even testified that he believed his supervisors knew or had reason to know he was investigating in furtherance of such an action.

4. Robertson has not pointed to any evidence supporting the jury finding regarding Bell's knowledge

Nonetheless, Robertson argues that certain indirect evidence supports the jury finding that Bell knew of his false claims investigations. Specifically, he cites testimony that: (1) he expressed "concerns" about certain cost items to his supervisors; (2) his supervisors are aware that filing false claims is illegal; (3) he believed his attempt to verify certain charges went beyond his job responsibilities.

None of this testimony, however, conflicts with the undisputed direct evidence that Bell was unaware of Robertson's alleged qui tam investigation. Nor, in the light of the record as a whole, could this evidence support an inference that Bell knew of such investigations.

According to all the testimony, including Robertson's, he raised his concerns solely in the ordinary course of his duties as a contract administrator and in terms that indicated no ulterior purpose. That Robertson supervisors are aware that fraudulent charging is illegal shows nothing about the issue at hand—they could not properly carry out their jobs without that knowledge. Finally, there is not a shred of evidence that Robertson's personal, unexpressed belief regarding the nature of his investigations (which were in actuality requests that other people investigate and provide him with certain information) manifested itself in any objective form or action that did or even could have put Bell on notice.[4]

Having reviewed all the evidence in the light and with all inferences most favorable to Robertson, the Court concludes that there was no basis, other than pure speculation, or which the jury could have concluded that Bell knew Robertson was acting in furtherance of a qui tam action (Special Verdict Question No. 2). Because such knowledge was a predicate for a finding that Bell discharged Robertson because of his actions in furtherance of

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[4] Without directly stating, Robertson implies that there was no need to prove Bell knew any investigations he may have done were in furtherance of a qui tam action. The Court finds no merit in his suggestion. While it is possible that in some situations the employer's knowledge that an employee was acting in furtherance of a qui tam action could be inferred, in this case the indistinguishable nature of Robertson's job responsibilities and his alleged qui tam activities prevents such an inference.

The Court takes judicial notice that, in fact, Robertson did not actually file a qui tam action until March 9, 1993, over two years after his discharge and well after the filing of this action. On June 14, 1993, the United States notified the Court of its election to decline to intervene in that case, No. 4:93-CV-152-A, and Robertson filed a notice of voluntary dismissal of the action.

qui tam action, the Court finds that the jury finding to that effect (Question No. 3) also was unsupported by the evidence and must be reversed.

B. Pretext

Bell also contends there was insufficient evidence to support the jury's finding that its proffered reason for discharging Robertson was pretextual. Again the Court agrees.[5]

Bell introduced evidence to show Robertson was discharged as part of a general layoff spread over all Bell's departments. After determining that two persons in Robertson's department had to be laid off, and examining the rating for the department's employees, Mr. McCrary, the supervisor in charge of the layoff decision, found that Robertson had the lowest rating for the last year, a "3". Subsequently, because there were several people who had been graded a "3+", McCrary also looked at the preceding year. Robertson remained in the bottom two and he and the other lowest rated employee were laid off.

Robertson argues there were three pieces of evidence that supported the jury finding of pretext. First,

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[5] Question Nol 4 asked whether the jury found by a preponderance of the evidence that Bell had established a reasonable non-retaliatory explanation for discharging Robertson. If the jury's finding was negative, it did not have to go on to find that Bell's explanation was a pretext for retaliation. Under governing law, however, Bell did not have the burden of persuasion, but only of producing legally sufficient evidence of the reasons for Robertson's discharge. See, e.g., Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 254-55 (1981) (cited as governing retaliation claims in E.E.O.C. v. J.M. Huber Corp., 927 F. 2d 1322, 1326 (5th Cir. 1991)). Because Bell offered substantial evidence that it discharged Robertson as a result of his rating, the Court therefore interprets the jury's finding as equivalent to a determination that the offered reason was a pretext.

although Robertson's immediate supervisor had rated him a "3+", the second supervisor up the chain, Mr. Wilson, lowered the rating to a "3".[6] Second, Robertson introduced the rating sheets for four employees in Robertson's department that had received, in addition to a grade on a 1 through 5 system, a grade on a scale of 1 to 100. In his closing argument, Robertson's attorney argued that had Robertson been graded on the latter scale, he would not have been one of the two laid off. Finally, Robertson introduced a document from six months after he was laid off purportedly showing there was a contract administrator position open both before and after he was laid off (Plaintiff's Exhibit 8).

None of these facts was sufficient to prove Bell's explanation was a pretext for retaliation. To begin with, Robertson did not show that any of this evidence was even relevant to the determination to lay him off. As the Court noted during argument on Bell's motion for judgment as a matter of law, even had Robertson received a "3+" rating for the most recent year, he still would have been one of the two lowest rated employees in his department based on the past two years' rating that Bell reviewed and thus still would have been one of the two laid off.[7] With regard to the 1 to 100 rating system, the testimony showed it was used by a supervisor other than Robertson's. There was no evidence that Robertson was ever rated on the 1 to 100 scale or that Mr. McCrary considered the employees' rat-

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[6] Mr. Wilson explained his determination to lower Robertson's grade on the ground that Robertson had been late consistently and that Robertson's supervisors had to rewrite letters for him on a number of occasions. This explanation was corroborated by other testimony and documents introduced by Bell.

[7] Robertson received a "3+" the year before. The two persons rated immediately above Robertson and the other employee laid off each received "3+" for the current year and "4" for the prior year.

ings on other than the 1 to 5 scale in determining whom to discharge. Robertson's counsel's argument that Robertson would not have been among the lowest two employees had he been rated on the 1 to 100 scale was purely speculative, had no foundation in evidence, and should not have been considered by the jury.[8] Similarly, Robertson never established the relevance of the apparent opening for a contract administrator to his own layoff. On its face, Plaintiff's Exhibit 8 shows an opening for a contract administrator, whereas Robertson was a senior contract administrator, a higher position. Without further factual support, Exhibit 8 could not be a basis for finding pretext.

In addition, the evidence referred to by Robertson does nothing to support a finding that Bell's reason for his discharge was a pretext for retaliation. As the Fifth Circuit has noted in the context of an age discrimination claim, the mere fact that there are some inconsistencies in the termination procedure is insufficient to prove the employer's explanation is a pretext for discrimination (here retaliation). "To make out a[ ] [retaliation] claim, the plaintiff must establish the existence of discrete facts that show some nexus between the employment actions taken by the employer and the employee's [protected behavior]." Moore v. Eli Lilly & Co., 990 F.2d 812, 819 (5th Cir. 1993) See also St. Mary's Honor Center v. Hicks, __ U.S. __, 61 U.S.L.W. 4782, 4786 (June 25, 1993) (discrimination plaintiff must prove not only that employer's reason for discharge is false, but also that discrimination was the real reason). Here, Robertson failed to prove that Bell knew he was conducting investigation in furtherance of a qui tam action and accordingly failed to prove that Bell discharged him because of such investigation. Without such proof, Robertson never established a prima facie case of retaliation and the jury never should have reached Bell's explanation of Robertson's discharge. Nonetheless, even if the jury properly had reached the issue of pretext,

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[8] The Court's instructions stated that the argument of counsel was not evidence.

there is not one iota of evidence in the record supporting a finding that Bell's real reason for the discharge was retaliation.

The jury's finding on pretext must also be reversed.

C. Bell's motion is proper

Robertson contends that in moving for judgment as a matter of law during trial, Bell did not adequately state that the motion was based on the lack of evidence of Bell's knowledge of Robertson's qui tam investigations. A review of the earlier oral motions shows, however, that Bell raised the lack of evidence with regard to Bell's knowledge. See Tr. Vol. III at 197 (no concerns about Bell's charging were ever communicated to anyone at Bell except in the ordinary course of Robertson's business); Tr., Vol III at 198 (there was no evidence that any of Robertson's supervisors knew he was investigating fraud; whatever was in his mind [with regard to a qui tam investigation], Bell didn't know about it).

The Court finds that Bell laid the proper foundation during trial for renewing its motion for judgment as a matter of law.

D. Robertson is not entitled to a new trial on his wrongful discharge claim

Although the parties have not addressed the issue, the Court must consider whether, once judgment as a matter of law is granted on Robertson's retaliation claim, he is entitled to ta jury determination on his wrongful discharge claim. The jury did not reach the latter claim since it was instructed it could not do so if it found Robertson had been discharged in retaliation for investigations taken if furtherance of a qui tam action.

The Court holds that Robertson is not entitled to a jury determination of his wrongful discharge claim. This Court was overly lenient in permitting Robertson to take that claim to the jury at the same time that he was claiming retaliation. The Fifth Circuit, applying Texas law, has

made it clear that "an employee who alleges wrongful discharge for refusing to perform a criminal act cannot advance additional claims." Pease v. Pakhoed Corp., 980 F.2d 995, 997 n. 1 (5th Cir. 1993) (emphasis added). In particular, because the refusal to perform an illegal act must be the sole reason for the plaintiff's discharge, a second claim that the plaintiff was fired for another reason, such as age discrimination or retaliation, is mutually inconsistent with the claim of wrongful discharge. See Guthrie v. Tifco Industries, 941 F.2d 374, 379 (5th Cir. 1991).

In earlier order on summary judgment, the Court warned Robertson that by continuing urge his retaliation claim, he was contradicting his claim for wrongful discharge. Robertson nevertheless proceeded to trial on his retaliation claim. Even now, he argues there was sufficient evidence to show his discharge resulted from retaliation and that judgment in his favor on that claim should be entered. The Court finds that Robertson's position with respect to the retaliation claim is inconsistent with and negates his wrongful discharge claim. Therefore, although there is insufficient evidence to support the verdict on the retaliation claim, the Court concludes that Robertson's claim for wrongful discharge must be dismissed as a matter of law.

CONCLUSION

Although the Court is hesitant to overturn a jury verdict, and would not do so were there any evidence that could reasonably support the jury's findings, this is the unusual case where the jury's findings were clearly based solely on prejudice or speculation and not on the evidence or reasonable inferences therefrom.[9] Having reviewed all the evidence in the light most favorable to Robertson, the Court concludes that there was insufficient evidence to support the jury's findings that: (1) Bell knew of Robertson's alleged investigations in furtherance of a qui tam action; (2) Bell discharged Robertson because of such investigations; and (3) Bell's proffered reason for dis-

charging Robertson was a pretext for its real reason, which was retaliation.

Accordingly, the Court ORDERS that Bell's motion for judgment as a matter of law is GRANTED. A judgment in Bell's favor shall be issued herewith.

Signed this 29th day of July, 1993.

Eldon B. Mahon

ELDON B. MAHON
UNITED STATES DISTRICT JUDGE

[9] The jury also improperly speculated with respect to damages. The jury was instructed it could award Robertson any costs actually expended in replacing fringe benefits he would have received had he not been discharged. See Brunnenmann v. Terra Internat'l, Inc., 973 F.2d 175, 178 (5th Cir. 1992). Robertson put on no evidence that he had incurred such costs. Nonetheless, the jury awarded him $22,200 for such expense.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

GEORGE S. ROBERTSON	§	
VS.	§	CIVIL ACTION NO 4:92-CV-535-E
BELL HELICOPTER TEXTRON, INC.	§	

CHARGE OF THE COURT

MEMBERS OF THE JURY:

Now that you have heard the evidence and the argument, it becomes my duty to give you the instructions of the Court as to the law applicable to this case.

It is your duty as jurors to follow the law as stated in the instructions of the Court, and to apply the rules of law so given to the facts as you find them from the evidence in the case.

You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole. Neither are you to be concerned with the wisdom of any rule of law stated by the Court. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in the instructions of the Court; just as it would be a violation of your sworn duty, as judges of the facts, to base a verdict upon anything but the evidence in the case.

Justice through trial by jury must always depend upon the willingness of each individual juror to seek the truth as to the facts from the same evidence presented to all the jurors; and to arrive at a verdict by applying the same rules of law, as given in the instructions of the Court.

At the outset, I am sure you understand by this time that all parties to this litigation whether individual

or corporate, or whatever their character, must be treated exactly alike insofar as their rights are concerned. This case should be considered and decided by you as an action between persons of equal standing in the community, of equal worth, and holding the same or similar stations in life. A corporation is entitled to the same fair trial at your hands as a private individual. The law is no respecter of persons; all persons, including corporations, stand equal before the law, and are to be dealt with as equals in a court of justice. You should not have any personal feeling or preferences as between individuals and corporations.

A corporation may only act through natural persons, who are known as its agents. In general, any agent or representative of a corporation possessing adequate authority may bind the corporation by his acts, declarations and omissions.

Do not let bias, prejudice, sympathy, resentment, or any such emotion play any part in your deliberations, and do not speculate on matters not shown by the evidence. Keep constantly in mind that it would be a violation of your sworn duty to base a verdict upon anything but the evidence in this case. You will carefully and impartially consider all the evidence in the case, follow the law as stated by the Court, and reach a just verdict, regardless of the consequences.

This case is submitted to you on special issues, propounded to you in the form of questions, which you will answer from a preponderance of the evidence submitted to you under the rulings of the Court, answering the questions by unanimous consent of the jury through your foreperson and writing your answers in the space provided therefor following each question. It is necessary that the jury be advised of, and understand, certain legal terms which play such a large part in the determination of this sort of litigation, so at the outset, I will give you some definitions and explanations.

In a civil action such as this the burden is on the plaintiff to prove every essential element of his case by a preponderance of the evidence. If the proof should fail to

establish any essential element of the plaintiff's claim by a preponderance of the evidence of the case, the jury should find for the defendant.

By the term "preponderance of the evidence," as used in this Charge, is meant the greater weight or degree of credible evidence in the case. The term "evidence" includes the sworn testimony of the witnesses and the exhibits admitted in the record. To "establish by the preponderance of the evidence" means to prove that something is more likely so than not so. In other words, a preponderance of the evidence in the case means such evidence as, when considered and compared with that opposed to it, has more convincing force, and produces in your minds belief that what is sought to be proved is more true than not true. It does not necessarily mean the greater volume of evidence or the greater number of witnesses, but it means that when you sift from all the evidence of this case that which you consider credible or worthy of belief, you take the evidence on each side and the side that has greater weight, that tips the scale, that is the one that preponderates.

Where more than one claim is involved, as in this case, you should consider each claim and the evidence pertaining to it separately, as you would had each claim been tried before you separately. But, in determining whether any fact in issue has been proved by a preponderance of the evidence, you may, unless otherwise instructed, consider the testimony of all witnesses, regardless of who may have called them, and all exhibits received in evidence, regardless of who may have produced them.

Remember that any statements, objections or arguments made by the lawyers are not evidence in the case. The function of the lawyers is to point out those things that e most significant or helpful to their side of the case and, in so doing, to call your attention to certain facts or inferences that might otherwise escape your notice. In the final analysis, however, it is your own recollection and interpretation of the evidence that controls. What the lawyers say is not binding upon you.

Now, I have said that you must consider all of the evidence. This does not mean, however, that you must accept all of the evidence as true or accurate. You are sole judges of the credibility or "believability" of each witness and the weight to be given to his testimony. In weighing the testimony of a witness you should consider his relationship to the plaintiff or to the defendant; his interest, if any, in the outcome of the case; his manner of testifying; his opportunity to observe or acquire knowledge concerning the facts about which he testified; his candor, fairness and intelligence; and the extent to which he has been supported or contradicted by other credible evidence. A witness may be discredited or "impeached" by contradictory evidence, for example, by showing that he or she testified falsely concerning a material matter or by evidence that at some other time the witness has said or done something, or has failed to say or do something, which is inconsistent with the witness' present testimony. In short, you may accept or reject the testimony of any witness in whole or in part.

Also, the weight of the evidence is not necessarily determined by the number of witnesses testifying as to the existence or non-existence of any fact. You may find that the testimony of a smaller number of witnesses as to any fact is more credible than the testimony of a larger number of witnesses to the contrary. Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause you to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; and innocent misrecollection, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy result from innocent error or intentional falsehood.

After making your own judgment, you will give the testimony of each witness such credibility, if any, as you may think it deserves.

In the final analysis, it is the responsibility of the jury to make its own independent decision as to ultimate facts in this case and to reach that opinion based on all of the evidence, regardless of the source from which it came. While you should consider only the evidence in this case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions that reason and common sense lead you to draw from the facts that have been established by the testimony and evidence in the case. In no case, however, should a finding of a fact be based on mere surmise or speculation.

In this case, plaintiff George S. Robertson asserts two separate claims. First, he alleges that his former employer, Bell Helicopter Textron Inc. ("Bell"), terminated his job in February 1992 in retaliation for his investigating alleged fraud in Bell's practices of charging the government, and that his alleged investigations were in furtherance of a lawsuit to be filed by Mr. Robertson regarding such fraud. Mr. Robertson further contends that the reasons given by Bell as the basis for his discharge were a pretext for retaliation.

Defendant Bell denies these allegations. Bell alleges that while an employee of Bell, Mr. Robertson did not raise or investigate any charging issues except as required in the normal course of his duties. Bell further alleges that it terminated Mr. Robertson's employment as a result of a reduction in force and not as a result of a retaliatory move. Specifically, Bell asserts that it had no knowledge of any actions allegedly taken by Mr. Robertson in furtherance of a government contracting fraud lawsuit. If any such actions took place, Bell asserts that they occurred in secret and without its knowledge. Bell alleges that it did not learn of Mr. Robertson's contentions until after the decision to terminate him had been announced. Accordingly, Bell asserts that it could not have retaliated against Mr. Robertson on the ground he alleges.

Bell is a government contractor. Like all such con-

tractors, Bell must submit claims for payment to the government in connection with work it has performed.

You are instructed that federal law prohibits the submission of false or fraudulent claims to the federal government. A person who has knowledge that a company has made false claims to the government may bring a lawsuit against the company on his own behalf and on behalf of the government to recover the amount of money fraudulently obtained by the company. In order to make it more likely that persons with knowledge of false claims will bring or assist the government is such a lawsuit, the law protects employees who take actions in furtherance of such a lawsuit, including, for example, employees who investigate and bring to light information showing that their employers have submitted fraudulent claims to the government. Specifically, the law prohibits an employer form discharging such an employee in retaliation for the employee's acts taken in furtherance of a false claim action. The burden of proving such retaliation rest with the plaintiff.

You are instructed that Mr. Robertson must prove his claim of retaliatory discharge by a preponderance of the evidence. To do so, he must show by the greater weight of the credible evidence that:

(1) while an employee of Bell, he engaged in "*protected activity*"--in this case, that he investigated fraudulent charging practices by Bell in order to file or help the government to file a false claim lawsuit against Bell;

(2) prior to selecting him for layoff, Bell knew Mr. Robertson was investigating alleged fraud by Bell in order to file or help the government to file a false claim lawsuit; and

(3) Bell discharged Mr. Robertson <u>because of</u> his participation in "protected activity," that is, his investigation of fraudulent charging in order to file or help the government to file a false claim lawsuit. Mr. Robertson does not have to prove that retaliation was the sole basis for Bell's decision to discharge him, but he must prove that

"but for" his having engaged in "*protected activity*," he would not have been laid off.

You are instructed that in order to determine that Mr. Robertson engaged in "*protected activity,*" you must find that he investigated Bell's alleged fraudulent charging practices in furtherance of a false claim lawsuit, and not simply as part of his job as a Contract Administrator. Further, in considering whether Mr. Robertson has proven each of the three elements of his retaliation claim, it is irrelevant, and you shall not consider, whether Bell actually submitted fraudulent claims to the government. You must determine only whether Mr. Robertson proved each of the above elements by a preponderance of the evidence.

If you find that Mr. Robertson failed to prove any of the above elements by a preponderance of the evidence, then you must find for Bell on the retaliation claim. However, if you find that Mr. Robertson has established each of the elements by a preponderance of the evidence, then you must consider Bell's defense that its decision was based on reasonable factors other than retaliation. That is, you will consider whether Bell has articulated a legitimate, non-retaliatory reason for Mr. Robertson's discharge.

If you find that Bell has articulated a valid non-retaliatory reason for Mr. Robertson's discharge, then you must consider Mr.Robertson's contention that Bell's articulated reason is actually a pretext for retaliation. You are instructed that a stated reason or explanation is a "pretext" if it merely a cover-up or subterfuge to conceal the employer's actual motive. In determining whether Bell's articulated reason is a pretext, and not the true reason for Mr. Robertson's discharge, you may consider all the facts and circumstances. However, you are not to determine whether Bell's decision was a fair one or a wise one. Bell's reason need not be one that you would approve of or agree with or act on in conducting your own business. Bell, like any employer, is entitled to make its own policy and business judgments and it is not unlawful, under the facts of this case, to discharge an employee for any reason, even a

reason based on bad judgment, so long as the reason was one other than retaliation. Therefore, the only question you are to consider is whether Mr. Robertson has shown, by a preponderance of the evidence that Bell discharged Robertson because of his alleged investigation of Bell's fraudulent charging practices.

Mr. Robertson's second claim is that he was laid off in February 1992 for the sole reason that he refused to draft certain requests to the government for additional funds, on the ground that the request lacked proper substantiation.

Bell denies this allegation. Bell asserts that Mr. Robertson was never asked to write the letters in question and therefore could not have refused to write them; nor was Bell aware of his alleged refusal to write them. Bell alleges that the letters, and Mr. Robertson's involvement with them, if any, played no role in his selection for layoff. Bell further alleges that it discharged Mr. Robertson as part of a general layoff made necessary by an overall reduction in Bell's business. Bell asserts that, based on a comparison of pre-existing performance ratings from the preceding two years, Mr. Robertson was among the two lowest rated Contract Administrators and therefore was selected for one of two Contract Administrator layoffs.

Under the laws of the State of Texas, it is unlawful for an employer to discharge an employee for the sole reason that the employee refused to perform an illegal act.

You are instructed that Mr. Robertson must prove his claim of wrongful discharge by a preponderance of the evidence. To do so, he must show by the greater weight of the credible evidence that:

(1) he was required as part of his duties as an employee to perform an act he believed in good faith to be illegal;

(2) he refused to perform the required act; and

(3) Bell discharged Mr. Robertson for the sole reason that he refused to perform the required act. To prove that his refusal to perform the required act was the sole reason for his discharge, Mr. Robertson must show that

Bell discharged him for no other reason, whether you approve of that other reason or not.

With regard to the first two elements, you are instructed that Mr. Robertson need not prove that he refused to perform an act that was actually illegal, but he must prove by a preponderance of the evidence the he believed in good faith that the act he refused to perform was illegal.

If you find that Mr. Robertson has failed to prove any of the above elements by a preponderance of the evidence, then you must find for Bell on the wrongful discharge claim. However, if you find that Mr. Robertson has proven each element by a preponderance of the evidence, then you must consider Bell's explanation for Robertson's layoff.

Under the law, Bell is not required to prove that the reason for its decision was a good reason or a justifiable reason or that it was one you would agree with. The fact that an employer made an unwise, unjust or unfair business decision or based its decision on personality conflicts or other subjective criteria is not a sufficient basis for finding of wrongful discharge, so long as the reason was one other than the employee's refusal to perform an illegal act.

Mr. Robertson has the ultimate burden of proving by a preponderance of the evidence that Bell's stated reason for discharging him was a pretext, and the Bell actually discharged him solely for refusing to perform an illegal act. If you find that Mr. Robertson's pas performance of <u>any</u> factor other than his refusal to perform an illegal act contributed to his layoff, then you must find for Bell on this claim. For example, if you find that Mr. Robertson was laid off in retaliation for investigating fraudulent claims submitted by Bell to the government, then you cannot also find that he was fired solely for refusing to draft request letters to the government.

Now, I will instruct you on damages. You should not interpret the fact that I am giving instructions about damages as an indication in any way that I believe Mr.

Robertson should, or should not, win this case. It is your task first to decide whether Bell discharged Mr. Robertson in retaliation or for the sole reason that he refused to perform an illegal act. I am instructing you on damages only so that you will have guidance in the event you should decide that Bell unlawfully discharged Mr. Robertson. If you find for Bell on both of Mr. Robertson's claims, then you need not consider damages at all.

Under the law regarding Mr. Robertson's claims, a plaintiff who shows he was a victim of retaliation, or was discharged for the sole reason that he refused to perform an illegal act, is entitled to be restored to the position he would have occupied but for the wrongful discharge. Therefore, if you find from a preponderance of the evidence that Mr. Robertson was terminated in retaliation, or for the sole reason that he refused to perform an illegal act, then you must also determine the damages to which he is entitled. Those damages consist of the earnings he would have received from the date of discharge to the date of your verdict, but for Bell's unlawful conduct, plus any costs he actually has incurred in replacing fringe benefits he would have received if he had not been discharged.

It is the duty of a plaintiff to use reasonable efforts to find new employment, or other equivalent sources of income. Therefore, from the total amount of lost earnings plus costs incurred to replace fringe benefits you may determine, you must deduct any earnings, including unemployment compensation, actually received by Mr. Robertson since his discharge. Further, if you determine that Mr. Robertson has not exercised reasonable efforts in seeking new employment, then from any amount you may determine as lost earnings and cost incurred to replace fringe benefits, you must also deduct any earnings Mr. Robertson would have received had he exercised such reasonable efforts. Bell has the burden of proving the amounts Mr. Robertson has actually, or would have with diligence, received.

The burden of proof is on Mr. Robertson to establish all the elements of his damages. You are not permit-

ted to award speculative damages. Damages must be reasonable in any event. If you should find that Mr. Robertson is entitled to a verdict, you must award him only such damages as will reasonably compensate him for such lost earnings plus costs actually incurred to replace fringe benefits as you find, reduced by payments he actually has received or, in the exercise of reasonable diligence, could have received from other sources as described above.

There in one circumstance in which you may award Mr. Robertson damages in addition to his actual damages, described above. That is, if you decide that Mr. Robertson has proven by a preponderance of evidence that he was discharged for the sole reason that he refused to perform what he believed was an illegal act, and you award him actual damages, then you may consider whether also to award him punitive damages. The purpose of punitive damages is (1) to punish a wrongdoer for extraordinary misconduct, and (2) to warn others against engaging in similar conduct. In the case you have discretion to award punitive damages if you find by a preponderance of the evidence that:

(1) Bell discharged Mr. Robertson out of ill will or spite or for the purpose of causing injury to Mr. Robertson; or

(2) Bell discharged Mr. Robertson in reckless, callous or deliberate disregard of Mr. Robertson's rights.

If you find either of the above elements by a preponderance of the evidence, then you may award an amount of punitive damages which all jurors agree is proper. In fixing the amount, you should consider the following:

(1) How offensive was Bell's conduct?

(2) What amount is needed to prevent repetition of such conduct in light of the Bell's financial condition?

(3) Does the amount bear a reasonable relationship to the actual damages.

If you choose to award punitive damage, you should fix the amount using calm discretion and sound

reason. You must not be influenced by sympathy for or dislike of any party in the case.

Now, bearing in mind the foregoing instructions, as well as any further directions later given in the Charge or orally, you will return herein answers to the following questions, or to such of them as may be necessary, according to specific explanations in connection with said questions.

Signed this 22nd day of April, 1993.

ELDON B. MAHON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

GEORGE S. ROBERTSON	§	
	§	
VS.	§	CIVIL ACTION NO. 4:92-CV-535-E
	§	
BELL HELICOPTER TEXTRON INC.	§	

VERDICT OF THE JURY

We, the Jury, return or answers to the following questions as our Verdict in this case.

QUESTION NO. 1:

Do you find from a preponderance of the evidence that while an employee of Bell Helicopter, George S. Robertson engaged in "*protected activity,*" that is, did he investigate fraudulent charging practices by Bell in further false claims action?

ANSWER: ☑ Yes ☐ No

If you answered Question No. 1 "**YES,**" then proceed to the next question; if you answered Question No. 1 "**NO,**" then proceed to Question No. 6.

QUESTION NO. 2:

Do you find from a preponderance of the evidence that Bell Helicopter knew Mr. Robertson was engaging in "*protected activity*," as described in Question No. 1 above?

ANSWER: ☑ Yes ☐ No

If you answered Question No. 2 "**YES,**" then proceed to the next question; if you answered Question No. 2 "**NO,**" then proceed to Question No. 6.

QUESTION NO. 3:

Do you find from a preponderance of the evidence

that Bell Helicopter selected Mr. Robertson for layoff because of his participation in "*protected activity,*" as described in Question No. 1, and the "*but for*" such activity his layoff would not have occurred?

ANSWER: ☑ Yes ☐ No

If you answered Question No. 3 "**YES,**" then proceed to the next question; if you answered Question No. 3 "**NO,**" then proceed to Question No. 6.

QUESTION NO. 4:

Do you find from a preponderance of the evidence that Bell Helicopter established a reasonable non-retaliatory explanation for discharging Mr. Robertson?

ANSWER: ☐ Yes ☑ No

If you answered Question No. 4 "**YES,**" then proceed to the next question; if you answered Question No. 4 "**NO,**" then proceed to Question No. 11.

QUESTION NO. 5:

Do you find from a preponderance of the evidence that Bell Helicopter's explanation of Mr. Robertson's selection for layoff was a pretext, that is, merely a "cover-up" to disguise what was in truth an intent to retaliate against Mr. Robertson for his investigation of alleged fraud?

ANSWER: ☐ Yes ☐ No

If you answered Question No. 5 "**YES,**" proceed to Question No. 11 and do not answer Question Nos. 6 through 10. If you answered Question No. 5 "**NO**", proceed to the next question.

QUESTION NO. 6:

Do you find from a preponderance of the evidence that Mr. Robertson was required by Bell to perform an act which he believed at the time to be illegal?

ANSWER: ☐ Yes ☐ No

If you answered Question No. 6 "**YES,**" proceed to the next question. If you answered Question No. 6 "**NO**", then the foreperson should sign the verdict and return it to the court.

QUESTION NO. 7:

Do you find from a preponderance of the evidence that Mr. Robertson refused to perform the required act on the ground that to do so would be illegal?

ANSWER: ☐ Yes ☐ No

If you answered Question No. 8 "**YES,**" proceed to the next question, then the foreperson should sign the verdict and return it to the Court.

QUESTION NO. 8:

Do you find from a preponderance of the evidence that Mr. Robertson's refusal to perform the required act was the **sole** reason for his selection for layoff by Bell Helicopter?

ANSWER: ☐ Yes ☐ No

If you answered Question No. 8 "**YES,**" proceed to the next question. If you answered Question No. 8 "**NO**", then the foreperson should sign the verdict and return it to the Court.

QUESTION NO. 9:

Do you find from a preponderance of the evidence that Bell Helicopter established that Mr. Robertson was selected for layoff based, in whole or in part, on any reason whatsoever other than his refusal to perform an illegal act?

ANSWER: ☐ Yes ☐ No

If you answered Question No. 9 "**YES,**" proceed to the next question. If you answered Question No. 9 "**NO**", you must find for Mr. Robertson and proceed to Question No. 11.

QUESTION NO. 10:

Do you find from a preponderance of the evidence that Bell Helicopter's explanation for its action was a pretext and that Mr. Robertson's refusal to perform an illegal act was the sole reason for his selection for layoff?

ANSWER: ☐ Yes ☐ No

If you answered Question No. 10 "**YES,**" proceed to the next question. If you answered Question No. 10 "**NO**", then the foreperson would sign the verdict and return it to the Court.

QUESTION NO. 11:

What sum of money, if paid now in cash, do you find from a preponderance of the evidence would fairly and reasonably compensate plaintiff George S. Robertson for earnings that he has lost from February 14, 1992 to the present?

(You are reminded that in determining damages you must deduct any earnings that Robertson has actually received or would have received in exercising reasonable efforts to seek employment.)

Answer in dollars and cents, if any, or "None."

ANSWER: $62,800

Proceed to the next question.

QUESTION NO. 12:

What sum of money, if paid now in cash, do you find from a preponderance of the evidence would fairly and reasonably compensate plaintiff George s. robertson for any sums he has expended from February 14, 1992 to the present to replace fringe benefits he would have received if he had not been discharged?

Answer in dollars and cents, if any, or "None."

ANSWER: $22,200

If you answered Question No. 9 "**NO**" or Question No. 10 "YES", then proceed to the next question. Otherwise, the foreperson should sign the verdict and return it to the Court.

QUESTION NO. 14:

Keeping in mind the instructions of the Court regarding punitive damages, and the factors to be considered in awarding them, what among of money do you find by preponderance of the evidence should be assessed against Bell as punitive damages for Bell's discharge of Robertson?

Answer in dollars and cents, if any, or "None."

ANSWER: _____

Dated: _____

4-23-99
Date

Foreperson

April 22, 1999
Date

UNITED STATES DISTRICT JUDGE